(25,516)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 686.

EXPLORATION COMPANY, LIMITED, AND PHILIP L. FOSTER, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1916, of said Court, before the Honorable Walter I. Smith and the Honorable John E. Carland, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the sixteenth day of March, A. D. 1916, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Colorado, was filed in the Office of the Clerk of the United States Circuit Court of Appeaals for the Eighth Circuit, in a certain cause wherein Exploration Company, Limited, and Philip L. Foster are Appellants and The United States of America is Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(a)

1 Pleas in the District Court of the United States for the District of Colorado Sitting at Denver.

Be it Remembered, that heretofore, and on, to-wit, the third day of March, A. D. 1911, came The United States of America by Thomas Ward, Junior, Esquire, district attorney, and filed in the circuit court of the United States for the district of Colorado, its bill of complaint; and sued out of and under the seal of said circuit court a subpoena in chancery against Exploration Company, Limited, R. T. Bayliss, Alexander Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster.

And the said bill of complaint is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Colorado, Eighth Judicial District—in Equity.

The United States of America, complainant,
No.... vs. In Equity
Exploration Company, Limited, (a corporation), R. T. Bayliss, Alexander Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster, defendants.

2 To the Judges of the Circuit Court of the United States of America, for the Eighth Judicial Circuit, and District of Colorado:

The United States of America, by George W. Wickersham, Attorney General of the United States, brings this bill of complaint against the Exploration Company, Limited, a corporation organized and existing under the laws of Great Britian, R. T. Bayliss, a citizen of Great Britian residing at London, England, Alexander Burrell, and Albert L. Smith, both residents and citizens of the State of Montana, Henry Burrell a resident and citizen of the State of Wyoming, and Philip L. Foster, a citizen of Great Britian, now residing at New York City in the State of New York; and thereupon the complainant shows:

I.

The defendant Exploration Company, Limited (hereinafter described as the "Exploration Company") now is and dur-

ing all of the times hereinafter mentioned has been a corporation organized and existing under the laws of Great Britian, with its principal office and place of business at London, England. During all of the times herein mentioned the defendant Exploration Company has been, and it now is, engaged in the general business of promoting and developing mining and other industrial enterprises in divers parts of the world, including the State of Colorado and other
3 states and territories of the United States. Nearly all of the business of said Exploration Company during the times aforesaid has been and it still is, conducted through the medium of subsidiary corporations, organized for that purpose by and on behalf of said Exploration Company, and being, through the ownership of all or virtually all of the capital stock thereof, under the absolute control and direction of said Exploration Company. In the transaction of its business as aforesaid, the defendant Exploration Company has been, and is, the consumer of large quantities of coal. The defendant Exploration Company was the instigator and beneficiary of the several frauds hereinafter complained of, by which the complainant was defrauded of the title, use and possession of a large quantity of valuable coal lands situated in the state of Colorado, as hereinafter set forth.

The defendant R. T. Baylis now is, and during all of the times hereinafter mentioned has been, a citizen of Great Britian, and a resident of London, England. During all the times hereinafter mentioned, said R. T. Bayliss has been and he now is, the Chief Executive Officer of the defendant Exploration Company, to-wit, the Chairman of the Board of Directors of said Exploration Company. The Christian name of said R. T. Bayliss is to the complainant unknown, and he is therefore described herein as aforesaid, the com-
4 plainant reserving the right to insert his Christian name herein, as soon as the same shall be disclosed to, or otherwise become known by, the complainant.

Each of the defendants Alexander Burrell and Albert L. Smith is a resident and citizen of the state of Montana.

The defendant Henry Burrell is a resident and citizen of the state of Wyoming.

The defendant Philip L. Foster now is, and during all of the times hereinafter mentioned has been, a citizen of Great Britian. During all of the times hereinafter mentioned said Philip L. Foster has been, and he still is, a stockholder of the defendant Exploration Company and the general American financial and confidential representative thereof, with offices

at the City of New York in the State of New York, and a resident of said City of New York. As hereinafter more particularly set forth, the legal title to all of the lands of which the complainant was defrauded by the defendant Exploration Company as hereinafter set forth, was heretofore conveyed to, and now is held by, the defendant Philip L. Foster, in secret trust for the use and benefit of said Exploration Company. Said Philip L. Foster is sued not only personally and individually but also as trustee for any and all persons claiming under him any right, title or interest in or to any of those certain lands hereinafter particularly described.

5 II.

At all of the times herein mentioned the defendant Exploration Company as a foreign corporation, and each and all of the officers and stockholders thereof were citizens of Great Britian or some country other than the United States of America. By reason of the premises, neither said Exploration Company nor any of the officers or stockholders thereof ever were qualified by law to enter, purchase or hold any of the coal lands of the complainant under any of the public land laws of the United States, either individually, as an association, or otherwise.

Notwithstanding the premises, on or about the first day of March, A. D. 1902, the defendant Exploration Company, through its duly authorized officers and representatives, devised a scheme to defraud the complainant of the title, use and possession of a large quantity of its valuable coal lands situated in the state of Colorado, including those certain lands hereinafter particularly described, and obtain the title to and use and possession of said coal lands for the benefit of said Exploration Company.

To that end, on or about said first day of March, A. D. 1902, divers officers and agents of said company acting for it and in its interest, combined, confederated and conspired together to defraud the complainant of the title, use and possession of certain of its valuable coal lands situated in said state of Colorado, including those certain coal lands hereinafter particularly described, for the use and benefit
6 of said Exploration Company, in manner following, that is to say:

That by promises of pecuniary reward and other corrupt means divers persons severally qualified to enter and purchase coal lands under the coal land laws of the United States (said persons being hereinafter collectively described as

"entrymen") should be severally induced, procured and hired to enter and purchase coal lands of the complainant, in form and manner as provided by law, ostensibly for the sole use and benefit of said entrymen respectively, but in truth and in fact for the use and benefit of said Exploration Company, all under and pursuant to antecedent agreements with said entrymen respectively, by which said entries and purchases, and the title, use and possession of all the lands embraced therein, should inure to the benefit of said Exploration Company.

III.

Pursuant to and in consummation of said fraudulent and unlawful scheme and conspiracy, the defendant Exploration Company, acting in the premises through said conspirators or some of them induced, procured and hired certain persons, being nine in number (described herein as "entrymen") to enter and purchase, at the respective dates hereinafter set forth, certain of the coal lands of the complainant (hereinafter described), and thereupon said conspirators, or
7 some of them, caused such proceedings to be had and taken in the United States Land Office for the district in which said lands were situated and before the officers thereof, that those certain lands hereinafter described were entered and purchased by and in the names of said entrymen respectively.

Each of said entries and purchases was effected by filing in the said United States Land Office all necessary applications, affidavits, proofs and other documents, accompanied by all necessary payments and other proceedings, all in manner and form as required by the laws of the United States and the rules and regulations of the Department of the Interior of the United States applicable thereto.

IV.

Immediately upon making of said entries and purchases respectively, the Receiver of the United States Land Office at which said entries and purchases were made respectively, issued his several final receipts acknowledging the payment by each of said entrymen respectively of the purchase price required by law to be paid for the lands so entered and purchased by said entrymen respectively, and the Register of said United States land office issued his several final certificates certifying each of said entries and purchases respectively; and thereafter, and at the respective dates hereinafter mentioned, the complainant issued its nine
8 several patents, bearing date respectively as hereinafter set forth, conveying to said entrymen respective-

ly the legal title to said tracts of lands entered and purchased by said entrymen respectively, as aforesaid; all of which said patents (as the complainant is informed and believes and alleges) are now in the possession of the defendant Exploration Company or some officer, agent, attorney or trustee thereof.

V.

The names of said entrymen (in whose names said entries and purchases were made), the serial numbers of said entries and purchases (as shown by the records of the United States Land Office), the dates of said entries and purchases, the description of the lands so entered and purchased by said entrymen, and the dates of said patents, issued under said entries and purchases), respectively, are as follows, to-wit:

Emma F. Nutter, Coal Cash Entry No. 44, Ute, date of entry May 6, 1902, description of land South half of Northeast quarter, Section twelve, Township thirteen south, range ninety-one west of the Sixth Principal Meridian, date of patent October 16, 1902.

Maggie E. Holmes, Coal Cash Entry No. 45 Ute, date of entry May 6, 1902, description of land North west quarter Section twelve, Township thirteen south, Range ninety-one West of the Sixth Principal Meridian, date of patent October 16, 1902.

9 Ella Davis, Coal Cash Entry No. 46, Ute, date of entry May 6, 1902, description of land Southeast quarter, Section twelve, Township thirteen south, Range ninety-one West of the Sixth Principal Meridian, date of patent October 16, 1902.

Charles P. Nutter, Coal Cash Entry No. 47, Ute, date of entry May 6, 1902, description of land Northeast quarter of southwest quarter, Section twelve, township thirteen south, range ninety-one West of the Sixth Principal Meridian, date of patent October 16, 1902.

John Davis, Coal Cash Entry No. 48, Ute, date of entry May 6, 1902, description of land northeast quarter, Section thirteen, township thirteen south, range ninety-one west of the Sixth Principal Meridian, date of patent October 16, 1902.

Edyth Cartwright, Coal Cash Entry No. 49, Ute, date of entry May 7, 1902, description of land southwest quarter, section one, township thirteen south, range ninety-one west of the Sixth Principal Meridian, date of patent October 16, 1902.

Anna Nutter, Coal Cash Entry No. 56, Ute, date of entry May 12, 1902, description of land Southwest quarter of southeast quarter, Section seven, northwest quarter of northeast quarter, Section eighteen, township thirteen south, range ninety west of the Sixth Principal Meridian, date of patent September 6, 1902.

Daniel S. Baldwin, Coal Cash Entry No. 57, Ute, date
10 of entry May 12, 1902, description of land east half of southwest quarter, Section seven, northeast quarter of northwest quarter, Section eighteen, township thirteen south, range ninety west of the Sixth Principal Meridian, date of patent September 6, 1902.

Stella M. Fairlamb, Coal Cash Entry No. 58, Ute, date of entry May 12, 1902, description of land West half of southwest quarter, Section seven, west half of northwest quarter, Section eighteen, township thirteen south, Range ninety west of the Sixth Principal Meridian, date of patent September 6, 1902.

The first six entries above described were made at the land office of the United States situated at Montrose, Colorado, and the lands embraced in said entries respectively were and are situated in the land district of the United States attached to said land office. The last three entries above described were made at the land office of the United States then situated at Gunnison, Colorado, and the lands embraced in said last mentioned entries then were situated in the land district of the United States attached to said land office. The township in which the lands embraced in said last three entries above described are situated (together with other lands) has since been annexed to and now is a part of the land district of the United States attached to the said United States land office situated at Montrose, Colorado.

The lands embraced in said entries aggregate approxi-
11 mately one thousand, one hundred and twenty acres, and during all of the times herein mentioned were, and are, of a value of many thousands of dollars.

VI.

Each of said entries and purchases was made by said entrymen respectively as the agents for, and for the use and benefit of, said defendant Exploration Company, and pursuant to an antecedent agreement entered into between said conspirators, or some of them, and said entrymen respectively, by the terms of which said entrymen respectively agreed to enter, purchase and acquire title to, said lands embraced

in said entries respectively, for the use and benefit of said defendant Exploration Company, and convey the title to said defendant Exploration Company, and convey the title to said lands so entered and purchased to such person or persons as said Exploration Company should nominate, in secret trust for the use and benefit of said Exploration Company; in consideration whereof said conspirators, or some of them, on behalf of said Exploration Company agreed to pay all expenses and costs incurred in making said entries and purchases and further pay to each of said entrymen a certain sum of money, being (as the complainant is informed and believes and alleges) twenty-five dollars.

None of said entrymen intended or hoped to derive any benefit whatever from said entries and purchases re-
12 spectively, except as to the money agreed to be paid by and on behalf of said Exploration Company as aforesaid. The defendant Exploration Company, acting through said conspirators or some of them, selected the lands entered and purchased as aforesaid by each of said entrymen. All of the expenses, costs and fees incurred in the making of said entries and purchases were paid by and on behalf of said Exploration Company acting through said conspirators or some of them. The purchase price paid to the Receiver of the United States Land Office under each of said entries and purchases was paid by and on behalf of said Exploration Company, acting through said conspirators or some of them. And to induce said entrymen to permit said entries and purchases to be made in their respective names, for the use and benefit of said Exploration Company as aforesaid, each of said entrymen was paid money, to-wit, twenty-five dollars, by and on behalf of said Exploration Company, acting through said conspirators or some of them.

VII.

The acceptance and approval of said entries and purchases and the issuance of patents thereunder, were induced and procured by fraudulent concealment and misrepresentation of the true facts in the premises, practiced by said conspirators or some of them and said entrymen, with the authority and for the benefit of said Exploration Company, that is to say:

13 Said entrymen respectively were induced, procured and hired to enter and purchase said lands as aforesaid for the use and benefit of said Exploration Company as aforesaid, in a clandestine and surreptitious manner, and with an agreement and understanding between all of the parties to

said transactions that the true facts relating thereto should be concealed, and particularly from the knowledge of the officers of the United States whose duty it was to decide whether said entries and purchases should be accepted and approved and patents should issue thereunder. And at all of the times herein mentioned, and particularly in and during the aforesaid proceedings relating to said entries and purchases, and at all times thereafter, said conspirators and said entrymen fraudulently, unlawfully and dishonestly concealed from the aforesaid officers of the United States having authority in the premises the aforesaid circumstances under which said entries and purchases were made as aforesaid.

In addition to the aforesaid fraudulent concealment of said facts, and at the respective dates hereinafter mentioned, said conspirators or some of them did induce, procure and hire each of said entrymen to, and each of said entrymen then and there did, sign and swear to a certain affidavit in support of his aforesaid entry and purchase, which said affidavit was in form and substance as required by the laws of the
14 United States and the rules and regulations of the Department of the Interior of the United States applicable thereto, wherein and whereby he, said entryman did state, represent and swear, among other things, that he, said entryman, had expended a certain sum of money (in said affidavit named) in developing coal mines on the tract of land entered and purchased by him as aforesaid, and that he was then in the actual possession of said mines, and that he made the said entry for his own use and benefit, and not directly or indirectly for the use and benefit of any other party; all of which said statements and [representation] were and are false and fraudulent, and were known to each of said conspirators and said entrymen respectively and said Exploration Company so to be, in this, that none of said entrymen had ever expended any sum whatever in developing any coal mines upon any of said lands, but on the contrary the only sums of money that had ever been expended in that behalf had been expended by and on behalf of the defendant Exploration Company; and none of said entrymen ever were in possession of any of said lands or any mines thereupon, but on the contrary all of said lands and all mines thereupon then were in the possession of certain of said conspirators acting for and on behalf of the defendant Exploration Company as aforesaid; and none of said entries or purchases respectively were made for the use or benefit of said entrymen respectively, but on the contrary each of said entries and pur-
15 chases was made solely for the use and benefit of said Exploration Company as aforesaid.

The names of said entrymen who signed and swore to said affidavits, and the dates of said affidavits respectively, are as follows, to-wit:

Affidavit of Emma F. Nutter, dated May 5, 1902.

Affidavit of Maggie E. Holmes, dated May 5, 1902.

Affidavit of Ella Davis, dated May 5, 1902.

Affidavit of Charles P. Nutter, dated May 5, 1902.

Affidavit of John Davis, dated May 6, 1902.

Affidavit of Edyth Cartwright, dated May 6, 1902.

Affidavit of Anna Nutter, dated May 5, 1902.

Affidavit of Daniel S. Baldwin, dated May 5, 1902.

Affidavit of Stella M. Farilamb, dated May 5, 1902.

Said affidavit of John Davis was signed and sworn to before the Receiver of said United States Land Office situated at Montrose, Colorado. Each of the other of said affidavits was signed and sworn to before Millard Fairlamb as a Notary Public.

For the purpose of inducing the aforesaid officers of the United States having authority in the premises to accept and approve said entries and purchases and issue patents thereunder, said conspirators or some of them, on the dates of said entries respectively, filed and caused to be filed in the aforesaid land office of the United States at which said
16 entries were made respectively as aforesaid, the aforesaid false and fraudulent affidavits, procured as aforesaid, in support of said entries and purchases respectively; and said affidavits accompanied, and were a part of, the records and proceedings relating to said entries and purchases respectively, not only in the United States land offices respectively, but in the Department of the Interior of the United States. Said affidavits and the aforesaid statements and representations constituted the only evidence or means of information before or available to any of the officers of the United States having or exercising any authority in the matter of deciding whether said entries and purchases should be accepted and approved and patents issued thereunder. Each and all of said officers of the United States having or exercising authority in the premises were at all times ignorant of the true facts in the premises (as was well known to all of said conspirators and said entrymen), and because of the premises were induced to, and did, believe that each and all of said statements were true, which belief was induced by the afore-

said false and fraudulent statements and representations, and not otherwise; and relying upon said false and fraudulent statements and representations, and acting upon the belief in the truthfulness thereof, induced as aforesaid, and not otherwise, and having no knowledge of, or opportunity to ascertain, the true facts in the premises, the aforesaid
17 officers of the United States having and exercising authority in the premises accepted and approved said entries and purchases and issued the patents of the United States thereunder, as aforesaid.

VIII.

It was a part of said fraudulent and unlawful scheme and conspiracy, and designed so to be by said conspirators, said entrymen and said Exploration Company, that the several frauds perpetrated upon the complainant as aforesaid should be concealed from the complainant and that the complainant should be kept in ignorance thereof, to the end that the complainant should be delayed, obstructed and finally defeated in the institution and prosecution of judicial proceedings to enforce the rights and remedies of the complainant in the premises, and in the hope that when the complainant should ultimately discover said frauds, and should institute appropriate judicial proceedings to enforce the rights and remedies of the complainant in the premises, the perpetrators and beneficiaries of said frauds might, in defense of any and all such judicial proceedings, plead the delay in the institution thereof, fraudulently induced and caused by the perpetrators and beneficiaries of said frauds as aforesaid. Said purpose of concealment was consummated by the perpetrators and beneficiaries said fraudulent means, among others, of the several corrupt, fraudulent, clandestine and surreptiti-
18 tious devices hereinbefore and hereinafter set forth, and particularly in manner following, that is to say:

The said several frauds were designed, executed and consummated in a clandestine and surreptitious manner, and because thereof said frauds were known only to the parties thereto. It was understood and agreed among said conspirators that the true facts in the premises should be at all times concealed from the complainant, and each and all of said entrymen were by said conspirators enjoined, hired and paid to at all times conceal the facts in the premises from the complainant; and pursuant thereto, said conspirators and said entrymen at all times have concealed, and still do conceal, the true facts in the premises from the complainant, and at all times have obstructed, hindered and deceived, and still do obstruct, hinder and deceive, the complainant in the ascertainment of said facts.

With like purpose, intent and effect, and pursuant to said unlawful and fraudulent scheme and conspiracy, each of said entrymen executed and delivered his several deed purporting to convey to the defendant Alexander Burrell the legal title to the lands entered and purchased as aforesaid. The purported consideration stated in each of said deeds was a certain sum equivalent to or slightly in excess of ten dollars per acre for the lands purported to have been conveyed as aforesaid; but in truth and in fact each of said deeds was executed and delivered wholly without consideration, except the said sum to-wit: twenty-five dollars, corruptly, unlawfully and fraudulently paid to said entrymen respectively by and on behalf of the defendant Exploration Company as aforesaid. The defendant Alexander Burrell paid no consideration whatever for any of said deeds, and took no actual beneficial interest in or to any of the lands purported to have been conveyed as aforesaid, but on the contrary acted in the premises solely as the secret trustee for and on behalf of the defendant Exploration Company, and permitted the title to said lands to pass through him to other secret trustees of said Exploration Company (as hereinafter set forth) for the purpose of deceiving and defrauding the complainant as aforesaid.

The complainant is informed and believes and alleges that each of said deeds was signed at some time prior to the aforesaid entries and purchases, pursuant to said fraudulent and unlawful scheme and conspiracy; but for the purpose of further deceiving and defrauding the complainant in the premises, the dates of said deeds and the acknowledgments thereof were left blank, and afterwards a false date was inserted in each of said deeds and the acknowledgment thereof, said false dates inserted as aforesaid being subsequent to the acceptance and approval of said entries and purchases respectively by the Register and Receiver of the land office of the United States at which said entries and purchases were made respectively as aforesaid. The false date inserted in said deed executed by said Maggie E. Holmes was and is the sixth day of May, A. D. 1902. The false date inserted in said deed executed by said Anna Nutter was and is the thirteenth day of May, A. D. 1902. The false date inserted in each of said other deeds, executed by said entrymen as aforesaid, was and is the twelfth day of May, A. D. 1902.

With like purpose, intent and effect, and pursuant to said fraudulent and unlawful scheme and conspiracy, said defendant Alexander Burrell executed his certain deed, bearing

date November 15, 1902, purporting to convey the title to all of the lands purported to have been conveyed to him as aforesaid, to the defendant Albert L. Smith. The purported consideration stated in said last mentioned deed was the sum of one dollar, but in truth and in fact said deed was executed and delivered wholly without consideration, and the defendant Albert L. Smith took no actual beneficial interest in or to any of the lands purported to have been conveyed to him as aforesaid, but on the contrary acted in the premises solely as the secret trustee for and on behalf of the defendant Exploration Company, and permitted the title to said lands to pass through him to the defendant Philip L. Foster (another secret trustee of the defendant Exploration Company) for the purpose of deceiving and defrauding the complainant as aforesaid.

21 With like purpose, intent and effect, and pursuant to said fraudulent and unlawful scheme and conspiracy, on or about the first day of March, A. D. 1904, the defendant Albert L. Smith executed and delivered his certain deed or deeds of conveyance, bearing said last mentioned date, purporting to convey to the defendant Philip L. Foster the title to all of the lands purported to have been conveyed to said Albert L. Smith as aforesaid. The purported consideration stated in said last mentioned deed or deeds is the sum of one dollar, but in truth and in fact said deed or deeds were executed and delivered wholly without consideration, and the defendant Philip L. Foster took no actual beneficial interest in or to any of the lands purported to have been conveyed to him as aforesaid, but on the contrary acted in the premises solely as the secret trustee for and on behalf of the defendant Exploration Company, and permitted the title to said lands to pass to him, and said Philip L. Foster now holds the title to said lands, solely for the use and benefit of the defendant Exploration Company, and as the secret trustee thereof, and for the purpose of deceiving and defrauding the complainant in the premises as aforesaid.

The complainant is informed and believes and alleges that the defendant Philip L. Foster has executed some instrument or instruments in writing declaring and expressing the beneficial interests of the defendant Exploration Company in said lands of which the complainant was defrauded as aforesaid, but for the purpose of further deceiving and defrauding the complainant in the premises as aforesaid, said instrument or instruments at all times have been, and still are, withheld from the official records of the counties in which said lands are situated.

22

Said conspirators and said Exploration Company have at all times been assisted in the consummation of their aforesaid fraudulent and unlawful purposes of concealing from the complainant the true facts in the premises by the remote situation of said lands of which the complainant was defrauded as aforesaid, and by the further fact that the aforesaid several frauds were and are of such a nature as to conceal themselves and deceive, hinder and obstruct the complainant in the ascertainment of said facts, all of which has at all times been well known to, and taken advantage of by, said conspirators and said Exploration Company.

IX.

By the aforesaid unlawful, fraudulent, clandestine and surrepitious methods and devices, practiced upon the complainant by said conspirators and said exploration Company as aforesaid, the complainant and all of the officers of the United States having or exercising any authority in the premises, have been deceived and kept in ignorance of the true facts in the premises, and the true facts in the
23 premises have been concealed from the complainant and all of the officers of the United States having authority in the premises, and neither the complainant nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon the complainant as aforesaid, except as hereinafter set forth.

On or about the twelfth day of April, A. D. 1909, one Ralph S. Kelley and one James H. Andersen (Special Agents of the General Land Office of the United States) made a joint report to the Commissioner of the General Land Office of the United States charging, in general terms, the perpetration upon the complainant of the several frauds herein complained of, and immediately thereupon and at all times thereafter, the Department of the Interior of the United States and the Department of Justice of the United States have been engaged in the continuous and diligent prosecution of the work of investigation and ascertaining the true facts in the premises, and in preparing and instituting appropriate judicial proceedings to enforce the rights and remedies of the complainant in the premises. But by the aforesaid unlawful, fraudulent, clandestine and surreptitious methods and devices, practiced upon the complainant as aforesaid, and otherwise, the defendant Exploration Company and said conspirators at all times have deceived, hindered, obstructed and delayed,
24 and still do deceive, hinder, obstruct and delay the complainant and all of the officers of the United States

having and exercising authority in the premises, in investigating and ascertaining the true facts in the premises, and in preparing and instituting this suit for the enforcement of the rights and remedies of the complainant in the premises.

X.

The principal object and purpose of said conspirators, and each of the defendants herein, in deceiving the complainant as to the true facts in the premises and concealing said facts from the complainant and keeping the complainant in ignorance thereof as aforesaid, was that the discovery by the [complaint] of the several frauds perpetrated upon the complainant as aforesaid and the institution of judicial proceedings for the enforcement of the rights and remedies of the complainant in the premises might be delayed until six years had elapsed from the date of the issuance of said patents, to the end that said delay in the institution of said judicial proceedings, fraudulently induced and procured by the perpetrators and beneficiaries of said frauds as aforesaid, might be pleaded and relied upon in the defense of and to defeat any and all judicial proceedings that might be instituted for the enforcement of the rights and remedies of the complainant in the premises. But in that behalf the complainant alleges that by reason of the premises of this bill each and all of the defendants herein are (as in equity and good conscience they ought to be) forever estopped from pleading or asserting the delay in the institution of this suit, in defense of or to defeat the same.

XI.

Each of the defendants R. T. Bayliss, Alexander Burrell, Albert L. Smith and Henry Burrell claims some right, title or interest in or to the lands of which the complainant was defrauded as aforesaid, or some of them. The complainant leaves said defendants to set forth their respective claims as they may be advised, but in that behalf alleges that none of said defendants has any right, title or interest in or to any of said lands.

XII.

Each of the defendants threaten to, and unless restrained therefrom will, remove the coal and other natural products of said lands, and convert the same to their own use and benefit, and otherwise commit waste upon said lands, to the irreparable injury of the complainant in the premises.

In consideration whereof and for as much as the complainant is remediless in the premises save in a court of equity,

and to the end that the defendants and each of them may be required to make full and direct answer to each and all of the allegations in this bill contained, but not under oath (an answer under oath being hereby expressly waived); and
26 that each and all of the patents hereinbefore described, and which were issued by the complainant in the names of said fraudulent entrymen respectively as aforesaid, may be set aside and declared null and void and may be delivered up and canceled; and that the said several deeds of conveyance from the parties in whose names said fraudulent entries were made, and the other mesne conveyances subsequent thereto conveying the said several pieces and parcels of land hereinbefore described to the defendant Philip L. Foster may be set aside and declared null and void as against the complainant and that the same may be delivered up and canceled; and that it may be decreed that the complainant was and is the owner of all of the lands mentioned and described as aforesaid; and that during the pendency of this suit the defendants and each of them may be enjoined and restrained from mining or extracting any coal or other natural products from any of said lands, and from in any manner committing waste upon any of said lands; and that said defendants and each of them may be permanently so enjoined upon the rendition of final decree herein; and that the complainant may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your Honors to grant unto the complainant a writ of subpoena, to be directed to the said defendants Exploration Company, Limited, R. T. Bayliss, Alexander
27 Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster, thereby commanding them, and each of them, at a time certain and under a certain penalty (therein to be limited) to appear before this Honorable Court and then and there full, true and direct answer make to all and singular the premises and abide by and perform such orders, directions and decrees as the court shall make in the premises.

GEORGE W. WICKERSHAM,
Attorney General.

THOMAS WARD, Jr.
United States Attorney for the District of Colorado.

B. D. Townsend.
Special Assistant to the Attorney General.

Endorsed: Filed in the Circuit Court on March 3, 1911.

28 **The Joint and Several Demurrer of Exploration Company, Limited, and Philip L. Foster, Two of the Above-Named Defendants, to the Bill of Complaint of the United States of America.**

These defendants, Exploration Company, Limited, and Philip L. Foster, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, do jointly and severally demur thereto, and for cause of demurrer show;

First. That the complainant has not in by said bill made or stated such a cause as doth or ought to entitle it to any relief as is thereby sought and prayed, or otherwise, from or against these defendants, Exploration Company, Limited, and Philip L. Foster, or either of them.

Second. That it appears upon the face of said bill of complaint that the United States patents for each and every of the tracts of land specified and enumerated in the said bill (and to cancel and annul which said bill is brought) were issued more than six years prior to the date whereon
29 this suit was brought, and that the respective dates of the issuance of such patents, and each of them, were and are more than six years prior to the date whereon this suit was brought; and therefore, under and by virtue of the statutes of the United States in such case made and provided, this suit, with respect to each and every of said tracts of land, is barred by the lapse of time.

Third. That it appears upon the face of said bill that by reason of the long delay, laches and want of diligence of complainant in seeking redress on account of the matters alleged in said bill, it is not entitled to any equitable or other relief in the premises, either as prayed or otherwise.

Wherefore, and for divers other errors and imperfections appearing in the said bill, these defendants jointly and severally pray the judgment of this court whether they or either of them should be compelled to make any answer to the said bill, and prayed to be hence dismissed with their and each of their reasonable costs in this behalf sustained.

JOEL F. VAILE,
HENRY McALLISTER, Jr.
WILLIAM N. VAILE,
Solicitors for defendants, Exploration Company, Limited, and Philip L. Foster.

State of Colorado,
City and County of Denver—ss.

30 Philip L. Foster makes solemn oath and says that he is the duly qualified and acting agent and attorney in fact of Exploration Company, Limited, which is a corporation and one of the defendants in the above-entitled cause and one of the defendants joining in the foregoing joint and several demurrer, and as such agent and attorney in fact is duly authorized to make this affidavit in behalf of said corporation; and that the foregoing demurrer is not interposed for delay.

PHILIP L. FOSTER.

Subscribed and sworn to before me, this 17th day of May, 1911.

My commission expires July 30, 1912.

(Notarial Seal) OLIVER DEAN,
Notary Public.

State of Colorado,
City and County of Denver—ss.

Philip L. Foster makes solemn oath and says that he is one of the defendants in the above-entitled cause and one of the defendants joining in the foregoing joint and several demurrer; and that the foregoing demurrer is not interposed for delay.

PHILIP L. FOSTER.

Subscribed and sworn to before me this 17th day of May, 1911.

My commission expires July 30, 1912.

31 (Notarial Seal) OLIVER DEAN,
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY McALLISTER, Jr.,
Solicitor for said defendants, Exploration Company, Limited, and Philip L. Foster.

Endorsed: Filed in the Circuit Court on May 17, 1911.

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32 The Demurrer of Alexander Burrell to the Bill of Complaint of the United States of America.

This defendant, Alexander Burrell, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

First. That the complainant has not in and by said bill made or stated such a case as doth or ought to entitle it to any relief as is thereby sought and prayed, or otherwise, from or against this defendant, Alexander Burrell.

Second. That it appears upon the face of said bill of complaint that the United States patents for each and every of the tracts of land specified and enumerated in the said bill (and to cancel and annul which said bill is brought) were issued more than six years prior to the date whereon this suit was brought, and that the respective dates of the issuance of such patents, and each of them, were and are more than six years prior to the date whereon this suit was brought; and therefore, under and by virtue of the statutes of the United States in such case made and provided, this suit, with
33 respect to each and every of said tracts of land, is barred by the lapse of time.

Third. That it appears upon the face of said bill that by reason of the long delay, laches and want of diligence of complainant in seeking redress on account of the matters alleged in said bill, it is not entitled to any equitable or other relief in the premises, either as prayed or otherwise.

Wherefore, and for divers other errors and imperfections appearing in said bill, this defendant prays the judgment of this court whether he should be compelled to make any answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

JOEL F. VAILE,
HENRY McALLISTER Jr.,
WILLIAM N. VAILE,
Solicitors for said defendant, Alexander Burrell.

State of Montana,
County of Teton—ss.

Alexander Burrell makes solemn oath and says that he is one of the defendants in the above-entitled cause, and the de-

fendant filing the foregoing demurrer; and that the said demurrer is not interposed for delay.

ALEXANDER BURRELL,

34 Subscribed and sworn to before me, this 30th day of May, 1911.

My commission expires March 24, 1914.

(Notarial Seal) A. C. WARNER,
Notary Public for the state of Montana, residing at Choteau, Teton County.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY McALLISTER, Jr.,
Solicitor for said defendant,
Alexander Burrell.

Endorsed: Filed in the Circuit Court on June 2, 1911.

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35 (Order sustaining Demurrers to Bill of Complaint.)

May Term, 1911. October 13, 1911.

Before Judge Lewis.

This cause came on to be heard on the several demurrers of the respondents Exploration Company, Limited, and Philip L. Foster, and of Alexander Burrell, to the bill of complaint herein, and was argued by counsel, B. D. Townsend, Esquire, special assistant to the Attorney General, appearing as solicitor for the complainant, and Henry McAllister, Junior, Esquire, appearing as solicitor for said respondents. And thereupon, on consideration thereof;

It is ordered by the court that the said demurrers, and each thereof, be, and the same are hereby, sustained.

It is further ordered by the court that the complainant may tender herein an amended bill of complaint within thirty (30) days from this day, as it shall be advised; and that failing such tender, the bill of complaint shall be dismissed.

(Decree.)

Fourth Day, November Term. Monday, November 13th, A. D. 1911.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the seventh day of November, A. D. 1911.

The United States of America
5663 vs. In Chancery
Exploration Company, Limited, R. T. Bayliss, Alexander Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster.

Bill to cancel patents and for other relief.

This cause comes on now to be heard, Ralph Hartzell,
36 Esquire. assistant district attorney, appearing as solicitor for the complainant. And thereupon, the complainant saith that it will and doth hereby elect to stand upon its bill of complaint herein, and declines to plead further.

Wherefore, it is considered by the court that the bill of complaint herein be, and the same is hereby, dismissed out of this court.

(Mandate of U. S. Circuit Court of Appeals.)

United States of America—ss.

To the President of the United States of America,

(Seal U. S. Cir-) To the Honorable the Judges of the
(cuit court of) District Court of the United
(appeals 8th) States for the District of Colo-
(circuit) rado.

Greeting:

Whereas, lately in the District Court of the United States for the District of Colorado, before you, or some of you, in a cause between the United States of America, complainant, and the Exploration Company, Limited, a corporation, Philip L. Foster and Henry Burrill, defendants, wherein the decree of the said district Court in said cause, entered on the 13th day of November, A. D. 1911, is in the following words, viz:

This cause comes on now to be heard, Ralph Hartzell, Esquire, assistant district attorney, appearing as solicitor for

the complainant. And thereupon, the complainant saith that it will and doth hereby elect to stand upon its bill of
37 complaint herein, and declines to plead further;

Wherefore, it is considered by the court that the bill of complaint herein be, and the same is hereby, dismissed out of this court.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States circuit court of appeals for the eighth circuit, by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And whereas, at the December term, in the year of our Lord one thousand nine hundred and twelve, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of record from the said District Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said district court, in this cause, be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said district court with directions to overrule the demurrer and allow appelles to plead to the bill.

January 13, 1913.

You, therefore, are hereby commanded that such fur-
38 ther the opinion and decree of this court, as according to proceedings be had in said cause, in conformity with right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and thirteen.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Endorsed: Filed in the District Court on Oct. 27, 1913.

(Order of District Court setting aside Decree of Dismissal in accordance with Mandate, etc.)

Eighty-fifth Day, May Term. Monday, October 27th, A. D. 1913.

Present: The Honorable Robert E. Lewis, District Judge. and other officers as noted on the twenty-second day of July, A. D. 1913.

The United States of America
5663 vs. In Chancery
Exploration Company, Limited, R. T. Bayliss, Alexander Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster.

Bill to cancel patents and for other relief.

39 This cause comes on now to be heard, and thereupon, on consideration thereof and pursuant to a mandate from the United States Circuit Court of Appeals for the eighth circuit, filed herein;

It is ordered by the court that the decree of this court heretofore and on, to-wit, the thirteenth day of November, A. D. 1911, entered herein be, and the same is hereby, vacated, set aside and for naught held, and that the demurrer to the bill of complaint herein be, and the same is hereby, overruled, and that the defendants plead to the bill of complaint herein within thirty (30) days from this day, as they shall be advised.

Joint and Several Answer of the Defendants Exploration Company, Limited, and Philip L. Foster.

40 Come now the defendants Exploration Company, Limited, and Philip L. Foster, and for their joint and several answer to the bill of complaint herein, allege and say:

First. They admit that the defendant Exploration Company, Limited, (hereinafter called the Exploration Company), now is and during all of the times mentioned in the bill of complaint has been a corporation organized and existing under the laws of Great Britain, with its principal office and place of business at London, England; and that during such times it has been and is engaged in the general business of promoting and developing metalliferous mining in divers parts of the world, including the state of Colorado and other states and territories of the United States. They deny, however, that it has been during any of such times or is engaged in the business of promoting or developing other industrial

enterprises within the United States. They admit that a considerable portion of the business of the Exploration Company has been and is conducted through the medium of subsidary corporations organized for that purpose by the Exploration Company, some of which corporations have been, through the ownership of all or a portion of the capital stock thereof, under the control or direction of the Exploration Company. They deny, however, that nearly all of such business has been so conducted, and they further deny that in the transaction of its business the Exploration Com-
41 pany has been or is the consumer of large or any considerable quantities of coal. They deny that the defendant Exploration Company was the instigator or beneficiary of any frauds, whether as alleged in the bill or otherwise, by which the plaintiff was defrauded of the title, use or possession of a large or any quantities of valuable or other coal lands situated in the state of Colorado, and in that connection they deny that any such frauds as alleged in the bill were committed, either as alleged therein or otherwise, either by or at the instance of the defendant Exploration Company, or otherwise.

They admit that the defendant R. T. Bayliss is and at all times mentioned in the bill has been a citizen of Great Britian, and a resident of London, England, and that he now is and for a considerable period has been the chief executive officer of the Exploration Company, namely the Chairman of its Board.

They admit on information and belief that the defendants, Alexander Burrell and Albert L. Smith are residents and citizens of the state of Montana. As to the said Henry Burrell they are informed and believe that he died before the commencement of this suit.

They deny that the defendant Philip L. Foster now is or at any time heretofore has been a citizen of Great Britain, and on the contrary they allege that he has been and
42 is a citizen of the United States. They admit that the said Philip L. Foster has been since sometime in the year 1903 a stockholder of the Exploration Company and its General American financial or confidential representative, with offices at the City of New York, in the state of New York, and residing therein; but they deny that he was such stockholder or representative prior to said year. They admit that the legal title to all of the lands described in the bill was heretofore conveyed to and is now held by the defendant Foster in trust for the use and benefit of the Exploration Company. They deny, however, that the plaintiff

was defrauded of any of said lands by the Exploration Company or any one else, either in the manner specified in the bill or otherwise, and they deny that the said legal title is or has been held by the defendant Foster in secret trust, but aver that such holding in trust has been at all times, and is, open and without intention or effort to conceal the same in any manner.

Second. They admit that at all times mentioned in the bill the defendant Exploration Company was a foreign corporation, and that many of its officers and stockholders have been and were citizens of Great Britain or of some country other than the United States, but they deny that all of its officers and stockholders have been or were citizens of Great Britain or some other country than the United States. They deny that by reason of anything alleged in the bill the
43 Exploration Company, or any of its officers or stockholders, have never been qualified by law to enter, purchase or hold any of the coal lands of the plaintiff under any public land laws of the United States, either individually or as an association, or otherwise.

They deny that on or about the first day of March, 1902, or at any other date, the defendant Exploration Company, either through its officers or representatives, or otherwise, devised any scheme to defraud the plaintiff of the title, use or possession of large or any quantities of valuable or other coal lands situated in the state of Colorado, either those lands described in the bill or otherwise, or to obtain the title to or use or possession of said coal lands for the benefit of the Exploration Company.

They deny that for the purpose of so defrauding the plaintiff, or otherwise, and on or about the first day of March, 1902, or at any other time, any officers or agents of the Exploration Company, either acting for on in its interest, or otherwise, combined, confederated or conspired together to defraud the plaintiff of title, use or possession of certain of its valuable or other coal lands situated in the state of Colorado, either the coal lands described in the bill or otherwise, for the use or benefit of the Exploration Company,
44 either in the manner alleged in the bill or otherwise.

As aforesaid, they deny that there was any combination, confederation or conspiracy by the Exploration Company, or any of its officers or agents, acting in its interest or otherwise, to defraud the plaintiff of any such coal lands. So denying they further deny that any such scheme, combination or conspiracy was to be carried out as alleged in para-

graph II of the bill, or otherwise; they deny that it was to be done by promises of pecuniary or other reward, or any other corrupt means offered to or accepted by persons qualified to enter or purchase coal lands, and who are named in the bill herein as entrymen, or that by reason of any such rewards or means, or otherwise, such entrymen should be severally or otherwise induced, procured or hired to enter or purchase coal lands of the plaintiff in form or manner as provided by law, ostensibly for the sole use or benefit of said entrymen, or any of them, respectively, but in truth or in fact for the use or benefit of the Exploration Company, either under or pursuant to any agreements antecedent or otherwise with said entrymen, respectively, or either of them, by which such entries or purchases, or either of them, or the title, use or possession of the lands, or any portion thereof, embraced therein, should inure to the benefit of the Exploration Company, or otherwise.

Third. Denying as aforesaid that any such fraudulent
45 or unlawful scheme or conspiracy, or any scheme or conspiracy, was entered into, they further deny that in consummation thereof the defendant Exploration Company, acting in the premises through any of the persons charged in the bill as conspirators, induced, procured or hired the persons referred to in the bill as entrymen, being nine in number, or any of them, to enter or purchase, either at the respective dates set forth in the bill or at any time, any coal lands of the plaintiff, whether as described in the bill or otherwise, or that thereupon, or at any time, said persons alleged as conspirators, or any of them, caused any proceedings to be had or taken in the United States land office for the district in which said lands were situated, or before the officers thereof, or at any other place or before any other person, that the lands described in the bill of complaint, or any of them, were entered or purchased by or in the names of said entrymen, respectively.

They admit that the entries and purchases alleged in the bill, and particularly in paragraph V thereof, were made, and on information and belief they admit that such entries and purchases were perfected by filing in the United States Land office for the proper district, all necessary applications, affidavits, proofs and other documents, accompanied by all necessary payments and other proceedings, all in the manner and
form as required by the laws of the United States and
46 the rules and regulations of the Department of the Interior of the United States applicable thereto. They deny, however, that all or any of said entries or purchases was in pursuance of any unlawful scheme, confederation or

conspiracy of any character to which either of the answering defendants was a party.

Fourth. They admit, upon information and belief, that immediately upon or about the time of the making of said entries and purchases, as alleged in paragraph V of the bill, the Receiver of the United States Land Office at which said entries and purchases were made, respectively, issued his several final receipts acknowledging the payment by each of said entrymen, respectively, of the purchase price required by law to be paid for the lands so entered and purchased by said entrymen, respectively, and the Register of said United States Land Office issued his said several final certificates certifying each of said entries and purchases, respectively; and thereafter, and at the respective dates mentioned in the bill of complaint, the plaintiff issued its nine several patents, bearing dates respectively as alleged in such bill, conveying to said entrymen, respectively, the legal title to said tracts of land entered and purchased by said entrymen respectively.

Fifth. They admit that the names of the entrymen, serial number of the entries and purchases, the dates of said entries and purchases, the description of the land so entered and purchased by said entrymen, respectively, and the
47 dates of said patents issued under such entries and purchases, were as stated and enumerated in paragraph V of the bill.

They admit that the first six entries as described in said paragraph were made at the land office of the United States situated at Montrose, Colorado, wherein the lands embraced in such entries were and are situated. They further admit that the three entries last referred to in said paragraph V were made at the land office of the United States then situated at Gunnison, Colorado, and wherein the lands embraced in such entries were then situated. They admit, on information and belief, that the township in which such lands embraced in the last three entries are situated has since been annexed to and now is a part of the land district of the United States covered by the land office situated at Montrose, Colorado.

They further admit that the lands embraced in all of said entries aggregate approximately eleven hundred and twenty acres, and they admit, on information and belief, that at all times mentioned in the bill said lands were and they now are of a value of several thousands of dollars, but as to the real or market value thereof, then or at any time or now, these defendants are without knowledge.

Sixth. They deny that each or any of said entries or purchases was made by said entrymen, respectively, or either of

them, as the agent or agents for, or for the use or benefit of, the Exploration Company, either pursuant to an an-
48 tecedent, or other, agreement entered into between any persons alleged in the bill as conspirators, and said entrymen, respectively, or either of them. They deny that any such agreement was entered into, or that by the terms of any agreement said entrymen respectively, or either of them, agreed to enter, purchase or acquire title to the lands embraced in said entries, or either of them, for the use or benefit of the Exploration Company, or by reason of which they, or either of them, agreed to convey the title to such land so entered or purchased, or any portion thereof, to any person or persons nominated by the Exploration Company, either in secret trust for its use and benefit, or otherwise. They deny that any such agreement was ever made or entered into and so denying they further deny that as consideration thereof any one, whether alleged as a conspirator in the bill or otherwise, on behalf of the Exploration Company, agreed to pay all or any expenses or costs incurred in making said entries or purchases, or either of them, or further to pay each of said entrymen, or any of them, any sum of money whatsoever, whether $25.00 or any other amount.

They deny that none of said entrymen intended or hoped to derive any benefit whatever from said entries or purchases, respectively, except as to any moneys alleged in the bill, but herein denied, as paid or agreed to be paid by or on behalf of the Exploration Company. They deny that the Ex-
49 ploration Company, acting through any persons alleged in the bill as conspirators, or any one else, selected the lands entered or purchased by each or any of said entrymen, or that any of the expenses, costs or fees incurred in the making of said entries or purchases, or either of them, were paid by or on behalf of the Exploration Company, acting through said persons described in the bill as conspirators, or any of them or any one else. They deny that the purchase price paid to the Receiver of the United States land office under each or any of said entries or purchases, was paid by or on behalf of the Exploration Company acting through any person whomsoever; and they deny that for the purpose of inducing said entrymen, or either of them, to permit the said entries or purchases, or either of them, to be made in their respective names, for the use or benefit of the Exploration Company (as alleged in the bill but herein denied), each or any of said entrymen was paid any money, to-wit, twenty-five dollars, or any other amount, by or on behalf of the Exploration Company acting through any person whomsoever.

Seventh. They deny that the acceptance or approval of the entries or purchases, or either of them, or the issuance of patents thereunder, were induced or procured by fraudulent or other concealment or misrepresentation of the true facts respecting the circumstances under which such entries and purchases, or either of them, were made, either with or without the authority or for the benefit of the Exploration Company, and either as alleged in the bill, and particularly paragraph VII thereof, or otherwise.

They deny that said entrymen, or either of them, were induced, procured or hired to enter or purchase said lands, or any portion thereof, for the use or benefit of the Exploration Company, either in a clandestine or surreptitious manner, or otherwise, or with an agreement or understanding between all or any of the parties to said transactions that the true facts relating thereto should be in anywise concealed, either from the officers of the United States whose duty it was to decide whether said entries or purchases should be accepted or approved and patents should issue therefor, or from any other person. They deny that at all or any of the times mentioned in the bill, either during the proceedings relating to said entries or purchases, or at any other time, the persons described in the bill of complaint as conspirators, or said entrymen, or either of them, either fraudulent, unlawfully or dishonestly, or otherwise, concealed from the officers of the United States having authority in the premises, or from any other person or persons, the true circumstances under which said entries and purchases, or either thereof, were made; and they further deny that the same were made under the circumstances and by reason of the scheme or conspiracy alleged in the bill, or under any wrongful or illegal circumstances, scheme or conspiracy.

51 They deny that there was with respect of any of said entries or purchases any fraudulent or other concealment of the facts pertaining to the same, and they further deny that at the dates mentioned in the bill of complaint, or at any other time, the persons therein referred to as conspirators, or any of them, or any other person, induced, procured or hired each or any of said entrymen to sign and swear to a certain affidavit in support of their or his aforesaid entries or purchases, whether such affidavit was in form or substance as specified in the bill, and particularly paragraph VII thereof, or otherwise. They admit, on information and belief, that each of said entrymen did sign and swear to a certain affidavit in support of his entry and purchase, which affidavit was in form and substance as required by the laws of the United

States, but as to the contents of said affidavits, or either of them, or as to whether they set forth any of the matters and things as alleged in the bill, and particularly paragraph VII thereof, these defendants are without knowledge. They deny, however, that any statements or representations actually set forth or contained in any such affidavits were or are false or fraudulent, or were known to the persons described in the bill as conspirators, or to said entrymen, or either of them, or any other person, or the Exploration Company, to be false or fraudulent, either in the respects mentioned in the bill, and
52 particularly in paragraph VII thereof, or otherwise.

They deny that none of said entrymen had ever expended any sum in developing any coal mines upon any of said pended thereon had been so expended by or on behalf of the Exploration Company. They deny that none of said entrymen was ever in possession of any of said lands, or any mines thereon, or that all or any of said lands or mines thereon then were or had been in the possession of any of the persons alleged in the bill as conspirators, either acting for or on behalf of the Exploration Company, or otherwise. They deny that none of said entries or purchases were made for the use or benefit of the respective entrymen, or that each or any of said entries or purchases was made solely or at all for the use or benefit of the Exploration Company.

They admit, on information and belief, that the names of the entrymen who signed and swore to any affidavits pertaining to the respective entries, as aforesaid, were as stated in paragraph VII of the bill of complaint, but as to whether the dates or said affidavits respectively are correctly set forth therein these defendants are without knowledge, and they are also without knowledge as to the person or persons before whom all or any of said affidavits were signed and sworn to.

They deny that for the purpose of inducing any officers
53 of the United States having authority in the premises to accept or approve said entries or purchases, or issue patents thereunder, the persons described in the bill of complaint as conspirators, or any of them, or any other persons, on the dates of said entries respectively, or on any other dates, filed or caused to be filed in the land office of the United States at which said entries were made, any false or fraudulent affidavits, either procured as specified in the bill, or otherwise, or in support of said entries or purchases, or either of them. They admit, on information and belief, that whatever affidavits were made by said entrymen accompanied and were a part of the records and proceedings relating to said entries or purchases, not only in the United

States land office for the proper district, but in the Department of the Interior of the United States. They deny that the affidavits filed in connection with said entries or purchases, or any statements or representations contained therein, or in any other documents pertaining to said entries or purchases, constituted the only evidence or means of information before or available to the officers of the United States having or exercising any authority in the matter of deciding whether such entries or purchases, or either of them, should be accepted or approved or patents issued thereunder. They deny that each or any of the officers of the United States having or exercising authority with respect to said
54 [said] entries or purchases, were at all times, or at any time, ignorant of the true facts respecting the making of said entries and purchases, or that the persons described in the complaint as conspirators or said entrymen, or any one else, well or at all, knew that any of such officers were ignorant of the true facts. They deny that by reason of any frauds, conspiracies, schemes or illegalities, whether as alleged in the bill or otherwise, any of said officers of the United States having or exercising such authority, were induced to or did believe that each or any of said statements contained in said affidavits, or otherwise, were true, or that such belief was induced by any false or fraudulent statements or representations, whether as alleged in the bill, or otherwise. They deny that relying upon any false or fraudulent statements or representations (which these defendants aver were not made), or acting upon the belief of the truthfulness thereof, or induced as alleged in the bill, or having no knowledge of or opportunity to ascertain the true facts in the premises, the said officers of the United States, or either of them having or exercising authority in the premises, accepted or approved said entries or purchases, or issued the patents of the United States thereunder as aforesaid. They admit, however, that such officers did approve said entries and purchases, and issue said patents.

Eighth. They deny that any fraudulent or unlawful scheme or conspiracy designed by any of the persons alleged
55 as conspirators, or entrymen, whether referred to in the bill or otherwise, was ever entered into. So denying, they further deny that it was a part of any such scheme or conspiracy, or otherwise, that any frauds alleged in the bill to have been perpetrated upon the plaintiff, but which these defendants aver were not so perpetrated, should be concealed from the plaintiff, or that the plaintiff should be kept in ignorance thereof, either to the end that the plaintiff should be delayed, obstructed or finally defeated in the in-

stitution or prosecution of judicial proceedings to enforce the alleged rights and remedies of the plaintiff in the premises, or otherwise, or in the hope that when the plaintiff should ultimately discover said alleged frauds, or should institute any judicial proceedings to enforce the alleged rights or remedies of the plaintiff in the premises, the alleged perpetrators or beneficiaries of the frauds might in defense of any or all such judicial proceedings plead the delay in the institution thereof, alleged in the bill but herein denied to have been fraudulently induced or caused by the alleged perpetrators or beneficiaries thereof. They deny that there was any such purpose of concealment, and so denying, they further deny that the same was consummated by any alleged perpetrators or beneficiaries of any alleged frauds by means of corrupt, fraudulent, clandestine or other devices, whether as alleged in the bill, or otherwise, or in the [manned] specified in paragraph VIII of the bill, or otherwise.

56 They deny that any such frauds were perpetrated in any manner. So denying, they further deny that any frauds were designed, executed or consummated in a clandestine or surreptitious manner, or otherwise, or that by reason thereof they were known only to the alleged parties thereto. They deny that it was understood or agreed among any persons alleged in the bill as conspirators that the true facts in the premises should be at all, or any, times concealed from the plaintiff, or that each or any of said entrymen was by any person or persons alleged in the bill as conspirators enjoined, hired or paid at all or any times to conceal such facts from the plaintiff, or that such alleged conspirators or said entrymen, or either of them, have at all or any times concealed or still conceal the true facts in the premises from the plaintiff, or at all, or any times, have obstructed, hindered or deceived, or still do obstruct, hinder or deceive the plaintiff in the ascertainment of the true facts.

They further deny that with the purpose, intent or effect, as aforesaid, or as alleged in the bill, and particularly paragraph VIII, or pursuant to any unlawful or fraudulent scheme or conspiracy whatsoever, each or any of the [entryman] executed or delivered his several deed purporting to convey to the defendant Alexander Burrell the legal title to the lands entered or purchased as aforesaid. They admit that each of the persons
57 described in the bill as entrymen executed and delivered his several deed purporting to convey, and conveying, to the defendant Alexander Burrell the legal title to the lands entered and purchased as aforesaid, and that the con-

sideration stated in each of said deeds was a certain sum in excess of ten dollars per acre for the lands conveyed thereby. They deny that such deeds, or either of them were executed and delivered with the purpose, intent or effect or pursuant to any unlawful or fraudulent scheme or conspiracy as alleged in the bill and particularly paragraph VIII thereof, or otherwise, or for the purpose, intent or effect of concealing or attempting to conceal from the plaintiff or any one the true facts under which the said lands had been entered or purchased or to obstruct, hinder or deceive the plaintiff with respect to such facts. They deny that each or any of said deeds was executed or delivered without consideration, except the sum of twenty-five dollars, which the bill alleges, but these defendants deny, was corruptly, unlawfully, fraudulently or otherwise, paid to said entrymen respectively, or either of them, by or on behalf of the Exploration Company, or that said defendant Alexander Burrell paid no consideration for any of said deeds or took no actual interest in to [to] any of the lands purported to be conveyed thereby. They admit that said Alexander Burrell took title for the Exploration
58 Company. They deny that said Alexander Burrell acted in the premises as a secret trustee for the Exploration Company, or in anywise covertly, or that he permitted the title to pass through him to any other secret trustee of the Exploration Company, either as alleged in the bill or otherwise, for the purpose of deceiving or defrauding the plaintiff or otherwise.

They deny that each or any of said deeds from the entrymen was signed at any time prior to the entries or purchases, either pursuant to any fraudulent or unlawful scheme or conspiracy as alleged in the bill or otherwise; or that for the purpose of deceiving or defrauding the plaintiff, or otherwise, the dates or acknowledgments of the deeds were left bank, or that afterwards a false date was inserted in each or any of said deeds or in the acknowledgment thereof, which alleged false date alleged to have been inserted being subsequent to the acceptance or approval of the entries or purchases respectively by the register or receiver of the land office at which said entries were made respectively. So denying that any such false date was inserted, they deny that the false date alleged to have been inserted in the deed executed by Maggie E. Holmes was or is the sixth day of May, 1902, or any other date, or that the false date alleged to have been inserted in the deed executed by Anna Nutter was or is the thirteenth day of May, 1902, or any other date, or that the false
59 date alleged to have been inserted in each of the other deeds executed by the entrymen was or is the twelfth day of May, 1902.

They admit that the defendant Alexander Burrell executed his certain warranty deed, bearing date November 15, 1902, purporting to convey and conveying the title to all of the lands conveyed to him as aforesaid to the defendant Albert L. Smith, and that the consideration stated in said last mentioned deed was the sum of one dollar. They deny that said deed was executed or delivered wholly, or at all, without consideration, or that the defendant Albert L. Smith took no actual interest in and to the said lands conveyed thereby. They admit that he took such title in trust for the use or benefit of the Exploration Company, but they deny that he acted in the premises as a secret trustee for or on behalf of the Exploration Company, or in anywise covertly, or that he permitted the title to the said lands, or any of them, to pass through him to the defendant Foster for the purpose of deceiving or defrauding the plaintiff. They deny that the said deed from Alexander Burrell to said Smith was executed or delivered with the purpose, intent or effect, or pursuant to any unlawful or fraudulent scheme or conspiracy, as alleged in the bill and particularly paragraph VIII thereof, or otherwise, or for the purpose, or with the intent or effect of concealing or attempting to conceal from the plaintiff or anyone the
60 true facts under which the said lands had been entered or purchased or to obstruct, hinder or deceive the plaintiff with respect to such facts.

They admit that the defendant Albert L. Smith, on or about the first day of March, 1904, made, executed and delivered his certain deeds of conveyance, bearing said date, purporting to convey and conveying to the defendant Foster the title to all of the lands described in the bill of complaint, and that the consideration stated in said deeds was the sum of one dollar. They deny that said deeds, or either of them, were executed or delivered wholly, or at all, without consideration, or that the defendant Foster took no actual interest in or to the lands thereby conveyed, or any thereof. They admit that he took such title in trust for the use and benefit of the Exploration Company, but they deny that he acted in the premises as a secret trustee for or on behalf of the defendant Exploration Company or in anywise covertly, or that he permitted the title to said lands, or any of them, to pass to him as the secret trustee of the defendant Exploration Company or for the purpose of deceiving or defrauding the plaintiff in any manner. They deny that the said deeds from the defendant Smith to the defendant Foster were executed or delivered with the purpose, intent or effect, or pursuant to any unlawful or fraudu-

lent scheme or conspiracy, as alleged in the bill and particularly paragraph VIII thereof, or otherwise, or for the
61 purpose, or with the intent or effect of concealing or attempting to conceal from the plaintiff or anyone the true facts under which said lands had been entered or purchased or to obstruct, hinder or deceive the plaintiff with respect to said facts.

They deny that the defendant Foster has executed an instrument or instruments in writing declaring and expressing the beneficial interest of the defendant Exploration Company in said lands, and they deny that plaintiff was in anywise defrauded of said lands. They admit that said Foster has from time to time, informally and by correspondence with the Exploration Company acknowledged that he held such title for it. They admit that said correspondence has never been placed on the official records of the counties in which said lands are situated. They deny that the failure so to record the same was, has been or is, for the purpose of deceiving or defrauding the plaintiff in anywise, whether as alleged in the bill or otherwise.

The defendants deny that there were any frauds committed in securing the title to such lands or any thereof or that these defendants were parties thereto or had any knowledge or notice of such alleged frauds when they acquired their interest and titles in and to said lands. They deny the existence upon their part, or the part of any of the defendants or of any one referred to in the bill as a conspirator, of
62 any fraudulent or unlawful purpose either to conceal from the plaintiff the true facts with respect to the location, entry and patenting of said lands, or otherwise. However, they deny that even if said frauds had been committed or such fraudulent or unlawful purpose had existing, the consummation thereof would have been assisted by the alleged remote situation of which lands or that such frauds as alleged, would have been of such a nature as to conceal themselves, or deceive, hinder or obstruct the plaintiff in the ascertainment of the facts or any of them. They further deny that any of such matters has at all or any times been known to, or taken advantage of, by the persons denominated in the bill as conspirators, or any of them, or the defendant Exploration Company.

Ninth. They deny that any of the persons referred to in the bill as conspirators, or the Exploration Company have practiced any unlawful, fraudulent, clandestine or surreptitious methods or devices with respect to the premises or as alleged in the bill. They deny that by reason thereof or of

any thereof, or of any act by the defendants or either of them, or of any one acting for them, the plaintiff or any of its officers having or exercising any authority in the premises, have been deceived or kept in ignorance of the true facts in the premises or respecting the location, entry, purchase or patenting of said lands or any of them, or that such true facts have been in anywise concealed from
63 the plaintiff or any of its officers. As to when the plaintiff or its said officers first actually acquired knowledge or information or pretended knowledge or information of the alleged facts upon which they charge fraud, or as to how such knowledge or information was acquired, these defendants are without knowldege; but they deny that any frauds were perpetrated upon the plaintiff as alleged in the bill or otherwise.

As to whether on or about the 12th day of April, 1909, one Ralph S. Kelly and one James H. Anderson (Special Agents of the General Land Office of the United States) made a joint report, or any report, to the Commissioner of the General Land Office of the United States, charging in general terms the perpetration upon the plaintiff of the alleged frauds charged in the bill, these defendants are without knowledge. As to whether immediately thereupon or at any time or at all or any times thereafter, the Departments of the Interior and of Jusice of the United States have been engaged, either continuously or diligently or at all, in the work of investigation or ascertainment of the true facts in the premises, these defendants are also without knowledge. They deny however that at any such times said departments or either of them have been engaged in preparing or instituting appropriate judicial proceedings to enforce the rights or remedies of the plaintiff, and they deny that the plaintiff has either right or remedy with respect there-
64 of. They deny that any unlawful, fraudulent, clandestine or surreptitious methods or devices have been practiced upon the plaintiff, either by the defendant Exploration Company or any of the persons named in the bill as conspirators, or anyone else, and they deny that by any acts of whatsoever character, these defendants, or any of said persons, have received, hindered, [obstruct] or delay, or still do deceive, hinder, obstruct or delay the plaintiff or all or any of the officers of the United States having or exercising any authority in the premises, in investigating or ascertaining the true facts in the premises, or in preparing or instituting this suit for the alleged enforcement of the alleged rights or remedies of the plaintiff in the premises, and they deny that such rights or remedies exist either in law or equity.

Tenth. They deny that any of the persons referred to in the bill as conspirators, or any of the defendants, deceived the plaintiff as to the true facts in the premises, or concealed such facts from the plaintiff, or kept the plaintiff in ignorance thereof. So denying, they further deny that any of such persons or defendants had any object or purpose so to do. So denying, they further deny that any action by any of said persons or defendants or anything done or not done by them, or any of them, including these defendants, was to the end that the plaintiff might not discover the true facts (improperly denominated in the bill frauds) in the premises or that it might not institute judicial proceedings for the enforcement of the alleged rights or remedies of the plaintiff until six years had elapsed from the date of the issuance of such patents, or to the end that the delay in the institution of such judicial proceedings might be pleaded or relied upon in defense of or to defeat any judicial proceedings that might be instituted for the enforcement of the alleged rights or remedies of the plaintiff. They deny that any delay in the institution of this suit was fraudulently or otherwise, induced or procured by the defendants or either of them, or by those persons denominated in the bill "the perpetrators and beneficiaries of said frauds" or any of such persons. They deny that by reason of any matters alleged in the bill, or of any matters or things whatsoever these defendants, or either of them, are, or in equity or good conscience ought to be, forever, or at all estopped from pleading or asserting the delay in the institution of this suit, in defense of or to defeat the same.

Eleventh. They deny that the plaintiff was defrauded of any of the lands described in the bill.

Twelfth. They deny that at the time of the commencement of this suit, they threatened to remove coal or other natural products of such lands or convert the same to their own use, or to commit waste on such lands. They admit and aver, however, that at the time of the commencement of the suit, as well as for a long time prior thereto and ever since, they were lawfully entitled so to mine and remove such coal and other products, and they deny that such mining or removal would be to the irreparable, or any damage of the plaintiff.

II.

And further answering the bill of complaint these defendants aver that it appears upon the face of the bill, and the true fact is, that the United States patents for each and every of the tracts of land specified in the bill (and to cancel and

annul which patents this suit is brought) were issued more than six years prior to the date whereon this suit was brought, and that the respective dates of the issuance of such patents, and each of them, were and are more than six years prior to the date whereon this suit was brought; and therefore, under and by virtue of the statutes of the United States in such case made and provided, this suit, with respect to each and every of said tracts of land, is barred by the lapse of time.

III.

And further answering the bill of complaint these defendants aver that it appears upon the face of the bill that by reason of the long delay, laches and want of diligence of plaintiff in seeking redress on account of the matters
67 alleged in the bill, it is not entitled to any equitable or other relief in the premises.

Wherefore, these defendants pray that the bill of complaint be dismissed.

JOEL F. VAILE,
HENRY McALLISTER, Jr.,
WILLIAM N. VAILE,
Solicitors for defendants Exploration Company, Limited, and Philip L. Foster.

Endorsed: Filed in the District Court on Dec. 31, 1913.

(Record of Hearing.)

Thirty-second Day, May Term. Tuesday, July 20th, A. D. 1915.

Present: The Honorable Robert E. Lewis, District Judge, and the Honorable Jacob Trieber, Judge of the district court of the United States for the eastern district of Kansas, assigned to hold the district court of the United States, for the district of Colorado, and other officers as noted on the fourth day of May, A. D. 1915.

And Before the Honorable Jacob Trieber, Judge of the district court of the United States for the eastern district of Arkansas, assigned to hold the district court of the
68 United States, for the district of Colorado, the following proceeding was had:

This cause comes on now to be heard on final hearing on the bill of complaint, answer, testimony and exhibits taken and filed herein, Frank Hall, Esquire, special assistant to At-

torney General, appearing as solicitor for the plaintiff and Henry McAllister, Junior, Esquire, appearing as solicitor for the defendant. And thereupon, the court hears the testimony produced herein to the hour of adjournment.

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69 (Order of Submission. July 21, 1915)

Before Judge Trieber.

This cause comes on now to be further heard on final hearing on the bill of complaint, answer, testimony and exhibits taken and filed herein, Frank Hall, Esquire, special assistant to Attorney General, appearing as solicitor for the plaintiff and Henry McAllister, Junior, Esquire, appearing as solicitor for the [defendant]. And the court having heard the evidence produced herein and the arguments of counsel doth take the matter under advisement.

(Decree.)

Fifty-third Day, May Term. Wednesday, August 25th, A. D. 1915.

Present: The Honorable Robert E. Lewis, District Judge, and the Honorable Jacob Trieber, Judge of the district court of the United States for the eastern district of Arkansas, assigned to hold the district court of the United States, for the district of Colorado, and other officers as noted on the fourth day of May, A. D. 1915.

And Before The Honorable Jacob Trieber, Judge of the district court of the United States for the eastern district of Arkansas, assigned to hold the district court of the United States, for the district of Colorado, the following proceedings were had:

70 Bill to cancel patents and for other relief.

The United States of America,
5663. vs. In Chancery.
Exploration Company, Limited, R. T. Bayliss, Alexander Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster.

This cause came on to be further heard at this term, and was argued by counsel; Frank Hall, Special Assistant to the Attorney General, appearing as solicitor for the plaintiff, and Henry McAllister Jr., and George E. Tralles, appearing as solicitors for the defendants, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the patent dated October 16, 1902, issued by The United States of America to Emma F. Nutter, conveying title to the south half of the northeast quarter, section twelve, township thirteen south, range ninety-one west of the Sixth Principal Meridian, in the State of Colorado, be and the same is hereby annulled, revoked, cancelled and held for naught;

That the patent dated October 16, 1902, issued by The United States of America to Maggie E. Holmes, conveying title to the northwest quarter, section twelve, township thirteen south, range ninety-one west of the Sixth Principal Meridian, in the State of Colorado, be and the same is hereby annulled, revoked, cancelled and held for naught;

71 That the patent dated October 16, 1902, issued by The United States of America to Ella Davis, conveying title to the southeast quarter, section twelve, township thirteen south, range ninety-one west of the Sixth Principal Meridian, in the state of Colorado, be, and the same is hereby, annulled, revoked, cancelled and held for naught;

That the patent dated October 16, 1902, issued by The United States of America to Charles P. Nutter, conveying title to the northeast quarter of the southwest quarter, section twelve, township thirteen south, range ninety-one west of the Sixth Principal Meridian, in the State of Colorado, be, and the same is hereby annulled, revoked, cancelled and held for naught;

That the patent dated October 6, 1902, issued by The United States of America to John Davis, conveying title to the northeast quarter, section thirteen, township thirteen south, range ninety-one west of the Sixth Principal Meridian, in the State of Colorado, be, and the same is hereby, annulled, revoked, cancelled and held for naught;

That the patent dated October 16, 1902, issued by The United States of America to Edyth Cartwright, conveying title to the southwest quarter of section one, township thirteen south, range ninety-one west of the Sixth Principal Meridian, in the State of Colorado, be, and the same is hereby, annulled, revoked, cancelled and held for naught;

72 That the patent dated September 6, 1902, issued by The United States of America to Anna Nutter, conveying title to the southwest quarter of the southeast quarter, section seven, northwest quarter of the northeast quarter, section eighteen, township thirteen south, range ninety west of the Sixth Principal Meridian, in the State of Colorado, be, and the same is hereby, annulled, revoked, cancelled and held for naught;

That the patent dated September 6, 1902, issued by The United States of America to Daniel S. Baldwin, conveying title to the east half of the southwest quarter, section seven, northeast quarter of northwest quarter, section eighteen, township thirteen, south, range ninety west of the Sixth Principal Meridian, in the State of Colorado, be, and the same is hereby, annulled, revoked, cancelled and held for naught;

That the patent dated September 6, 1902, issued by The United States of America to Stella M. Fairlamb, conveying title to Lots three and four, section seven, and lots one and two, section eighteen, township thirteen south, range ninety west of the Sixth Principal Meridian in the state of Colorado, be, and the same is hereby, annulled, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in answer of the defendants, which was made, executed and delivered by Emma F. Nutter to Alexander
73 Burrell, and dated May 12, 1902, conveying title to the S½ NE¼, Sec. 12, T. 13 S., R. 91 W., 6th P. M., be and the same is hereby set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Maggie E. Holmes to Alexander Burrell, and dated May 6, 1902, conveying title to the NW¼ Sec. 12, T. 13 S., R. 91 W., 6th P. M., be and the same is hereby set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Ella Davis to Alexander Burrell, and dated May 12, 1902, conveying title to the SE¼ Sec. 12, T. 13 S., R. 91 W., 6th P. M., be and the same is hereby set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Charles P. Nutter to Alexander Burrell, and dated May 12, 1902, conveying title to the NE¼ SW¼, Sec. 12, T. 13 S., R. 91 W., 6th P. M., be, and the same is hereby, set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants which was made, executed and delivered by John Davis to Alexander Burrell, and dated May 12, 1902, conveying title to the NE¼,
74 Sec. 13, T. 13 S., R. 91 W. 6th P. M., be, and the same is hereby set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Mrs. Edith Cartwright to Alexander Burrell, and dated May 12, 1902, conveying title to the SW¼, Sec. 1, T. 13 S., R. 91 W., 6th P. M., be, and the same is hereby, set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Anna Nutter to Alexander Burrell, and dated May 13, 1902, conveying title to the SW¼ SE¼, Sec. 7, NW¼ NE¼, Sec. 18, T. 13 S., R. 90 W., 6th P. M., be, and the same is hereby, set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Daniel S. Baldwin to Alexander Burrell, and dated May 12, 1902, conveying title to the E½ SW¼, Sec. 7, NE¼ NW¼, Sec. 18, T. 13 S., R. 90 W., 6th P. M., be, and the same is hereby, set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Stella M. Fairlamb to Alexander Burrell, and dated May 12, 1902, conveying title to the W½ NW¼, Sec. 18, W½ SW¼, Sec. 7, T. 13 S., R. 90 W., 6th P. M., (which said lands are described in the patent issued to Stella M. Fairlamb on September 6, 1902, as Lots
75 3 and 4, Sec. 7, Lots 1 and 2, Sec. 18, T. 13 S., R. 90 W., 6th P. M.), be, and the same is hereby, set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Alexander Burrell and Abbie M. Burrell to Albert L. Smith, and dated November 15, 1902, conveying title to the SW¼, Sec. 1, T. 13 S., R. 91 W., NW.¼, Sec. 13, NE¼ SW¼, Sec. 12, SE¼ Sec. 12, S½ NE ¼, Sec. 12, NW¼, Sec. 12, all in T. 13 S., R. 91 W., 6th P. M., be, and the same is hereby, set aside revoked, cancelled and held for naught;

That the special warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Alexander Burrell and Abbie M. Burrell, to Albert L. Smith, and dated November 15,

1902, conveying title to the SW¼ SE¼, Sec. 7, NW¼ NE¼, Sec. 18, T. 13 S., R. 90 W., 6th P. M., E½ SW¼, Sec. 7, NE¼ NW¼, Sec. 18, T. 13 S., R. 90 W., 6th P. M., Lots 3 and 4, Sec. 7, and Lots 1 and 2, Sec. 18, T. 13 S., R. 90 W., 6th P. M. being the same parcel of land conveyed to said Alexander Burrell by Stella M. Fairlamb by deed dated May 12, 1902, described as follows: W½ NW¼, Sec. 18, W½ SW¼, Sec. 7, T. 13 S. R. 90 W., 6th P. M., be and the same is hereby set aside, revoked, cancelled and held for naught.

76 That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Albert L. Smith, to Philip L. Foster, and dated March 1, 1904, conveying title to the SW¼ SE¼, Sec. 7, NW¼ NE¼, Sec. 18, T. 13 S., R. 90 W., 6th P. M., E½ SW¼, Sec. 7, NE¼ NW¼, Sec. 18 T. 13 S., R. 90 W., 6th P. M., Lots 3 and 4, Sec 7, Lots 1 and 2, Sec. 18, T. 13 S., R. 90 W., W½ NW¼, Sec. 18, W½ SW¼, Sec. 7, T. 13 S., R. 90 W., 6th P. M., be, and the same is hereby, set aside, revoked, cancelled and held for naught;

That the said warranty deed mentioned in the bill of complaint, and in the answer of the defendants, which was made, executed and delivered by Albert L. Smith to Philip L. Foster, and dated March 1, 1904, conveying title to the SW¼, Sec. 1, T. 13 S., R. 91 W., NE¼ SW¼, Sec. 12, T. 13 S., R. 91 W., SE¼, Sec. 12, T. 13 S., R. 91 W., S½ NE¼, Sec. 12, T. 13 S., R. 91 W., and NW¼, Sec. 12, T. 13 S., R. 91 W., 6th P. M., be, and the same is hereby, set aside, revoked, cancelled and held for naught;

That the defendants, The Exploration Company, Limited, and Philip L. Foster, are hereby decreed and declared to be without any right, title, interest or claim whatsoever, in, to or upon said lands hereinbefore described, or any part thereof.

That the full legal and equitable title and ownership, including the right of immediate possession, in and to all of
77 said lands herein described, be and they are hereby, restored and vested in the United States of America; that said defendant's, The Exploration Company, Limited, and Philip L. Foster, and each of them, and all persons claiming under them, are hereby enjoined from claiming or attempting to exercise any right, title, interest, lien or claim whatsoever, in, to or upon said lands hereinbefore described, or any part thereof, and from mining or extracting any coal, or any other natural product, from any of said lands, and from in any manner committing waste upon any part thereof.

And it is further ordered, adjudged and decreed that the plaintiff have and recover of and from said defendants, The Exploration Company, Limited, and Philip L. Foster, the costs by it herein expended to be taxed, and that execution issue therefor as at law.

To which ruling, order, findings of fact filed, judgment and decree of court, and to each and every portion thereof, the defendants by their solicitors herein then and there excepted, and an exception is hereby allowed thereto.

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78 Statement of the Evidence prepared for purposes of Defendants' Appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States."

United States of America, Plaintiff,

vs.

The Exploration Company, Limited, and Philip L. Foster, Defendants.

This case came on for trial on July 20, 1915, the plaintiff appearing by Frank Hall, Esq., its attorney, and the defendants by Henry McAllister, Jr., Esq., and George E. Tralles, Esq., their attorneys.

Plaintiff's Evidence.

(Note: All the testimony in this case was taken on depositions with the exception of the witnesses McEniry, Kelly, Nye, and a portion of the testimony of the witness Foster, this portion being indicated in the following statement.)

HENRY C. DAVIS testified for the plaintiff:

Had experience as a coal miner both in Colorado and elsewhere. Am a son of John Davis and was acquainted with one Henry Burrell; met him eleven years ago; also knew one C. A. Molson; met him at the same time he became ac-
79 quainted with Henry Burrell; knew Alexander Burrell; was employed by Henry Burrell in the spring of 1902. He was looking for coal land and wanted some one familiar with such land to locate claims for him and look up section corners. He paid me $4.50 a day and I received in all $56 or $57. Mr. Burrell was hunting for coal and I looked up certain quarter section corners and county lines in the eastern part of Delta County. The land also extended over into Gunnison County. Did some digging on the lands examined, enough to find coal, and turned the information over to Mr.

Burrell. When we found coal on any quarter section we would locate it on the plats we had from the land offices at Gunnison and Montrose. The land was located near Bear Creek, northeast of Paonia. My father, John Davis, was associated with Mr. Burrell in the work. Mr. Henry Burrell told me he represented the London Exploration Company, Limited. (Objected to by defendants as hearsay, incompetent and irrelevant). Saw some envelopes in the camp that had Mr. Molson's address on them and his cable address was on the envelopes and stationery. Did the cooking for the camp and the tent was small and this letter paper and maps I had to pick up. The stationery contained the name of the Exploration Company, Limited, and had Mr. Molson's position as general manager of the Exploration Company of London, Limited, of the United States and Mexico. Mr. Burrell hired me personally and paid me. Had nothing to do with securing persons to make filings on the land. Was requested to make a filing myself by Mr. Henry Burrell. Understood the filing was to be made for the London Exploration Company. (Objected to by defendants as hearsay, incompetent and irrelevant).

80 My father, John Davis, got different persons to file on the coal lands and he seemed to make all arrangements. He got several different ones that I know of to file on coal land, and he made all arrangements about taking us up there; took us up there with a team and done the rustling generally. He took himself, Henry Burrell, a man named Welch, a Mexican and myself up to the camp. The only person that I ever saw on the lands who filed on them was my father. These lands that we examined were filed upon. My stepmother, Mrs. Ella Davis, made a filing. Think we looked over something like 1800 acres. Heard my father talk with one or two persons about making an entry and heard him say he would pay anyone $25. for making a filing. This $25. was for signing the filing papers. Mr. C. A. Molson came up to the camp once or twice. He looked over what we were doing and took some coal samples. He did not give any instructions to any person as to the work or as to how it should be done.

EDYTHE CARTWRIGHT testified for the plaintiff:

John Davis is my father. He came to the house and asked me if I wanted to sell my coal right. Asked what there was in it and he said $25. He told me to go down to Millard Fairlamb's office, sign the papers and in about a week or ten days I would get the $25. Signed some papers here in Delta and one paper in Salt Lake City. I don't remember what paper

it was that I signed in Salt Lake City. If I remember correctly it was in June of the same year that I signed the other papers in Mr. Fairlamb's office.

Certified copies consisting of sixteen photographic sheets, numbers 1 to 12 and 14 to 17 inclusive, covering the entry of the witness to the southwest quarter of section one, township thirteen south, range 91 west, sixth principal meridian, were identified by the witness, marked plaintiff's Exhibit A, and introduced in evidence. These papers are as follows:

81 (Sheet No. 1, Receiver's Coal Receipt—Face).

Receiver's Coal Receipt.

Coal Entry No. 49—Ute

Receiver's Office at Montrose Colo.
May 7th, 1902.

Received from Edyth Cartwright of Delta County, Colorado, the sum of sixteen hundred dollars and no cents, being in full for the SW¼ quarter of Section No. one (1) in Township No. 13 S., of Range No. 91 W. 6th P. M., containing one hundred sixty acres and no hundredths at $10.00 per acre.

$1600. JNO. E. PELTON, Receiver.

(Sheet No. 2, Receiver's Coal Receipt—Back).

Receiver's Coal Receipt.

Coal Entry No. 49 Ute

In Case of
Edyth Cartwright
Delta, Colo.
S. 1, T. 13 S., R. 91 W.

Land Office at Montrose, Colo.
May 7th, 1902.

(Sheet No. 3, Coal Declaratory Statement).

Coal Declaratory Statement.

Date Filed, April 12th, 1902.

No. ..... United States Land Office,

Montrose, Colorado.

I, Edith Cartwright whose post office address is Delta in County of Delta State of Colorado and whose actual residence

is the Town of Delta County of Delta State of Colorado
82 do solemnly swear that I am over twenty-one years of age, and a native born citizen of the United States; that I never have, either as an individual or as a member of an association, held or purchased any coal lands under the provisions of the Revised Statutes of the United States, relating to the sale of Coal Lands of the United States, and I do hereby declare my intention to purchase under the provisions aforesaid Southwest Quarter of Section One, in Township 13 South, of Range 91 West of the Sixth P. M., of lands subject to sale at the district land office at Montrose, Colorado, and that I came into possession of said tract on the 18th day of March, 1902, through my authorized agent, and have ever since remained in actual possession continuously; that I have caused to be located and opened a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of Twenty-Five Dollars, the said labor and improvements being as follows: In driving a tunnel or opening into the coal vein on said land, and done and situated upon the SW ¼ Sec. 1 Twp. 13 South Range 91 W. and I do furthermore swear that my knowledge of said land is not such as to enable me to testify understandingly with regard thereto; that a non-mineral affidavit is attached hereto, sworn to by Henry Burrell my duly authorized agent.

Signature MRS. EDYTH CARTWRIGHT.

State of Colorado,
County of Delta—ss.

I hereby certify that the foregoing Declaratory Statement was subscribed and sworn to before me and in my presence by the above named declarant who is personally known to me, this 12th day of April, 1902.

My commission expires February 12th, 1906.

MILLARD FAIRLAMB,
Notary Public.

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83 (Sheet No. 4, Non-Mineral Affidavit.)

Non-Mineral Affidavit.

State of Colorado,
County of Delta—ss.

I, Henry Burrell of lawful age, being duly sworn, on oath, say, that I am a citizen of the United States and a resident of Delta County in the State of Colorado my post office address being at Delta, in said County; that I am the duly au-

thorized agent of Edith Cartwright of Delta of Delta County, Colorado, who has, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, made declaration of intention to purchase Southwest Quarter of Section One, in township 13 South, of range 91 west of the 6th P. M. in the district of lands subject to sale at the land office at Montrose, Colorado, [Colorado]; that I am well acquainted with said land, and with each and every legal subdivision thereof, having frequently passed over the same; that my actual, personal knowledge of such land is such as to enable me to testify understandingly in regard thereto; that no portion of said tract is in the possession of any other party; and said land contains large deposits of coal, and said tract and each and every legal subdivision thereof is chiefly valuable therefor, and more valuable for coal mining than for agricultural purposes; that there is not to my knowledge, within the limits thereof, and more valuable for coal mining than for agricultural purposes; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver or copper, and that there is not to my knowledge, within said lands, any valuable deposit of gold, silver, copper, or mineral other than coal. So help me God.

HENRY BURRELL.

84 State of Colorado,
County of Delta—ss.

I hereby certify that the foregoing non-mineral affidavit was subscribed and sworn to before me, and in my presence, by the above named affiant, a creditable person, who is personally known to me, this 12th day of April, 1902.

My commission expires February 12, 1906.

MILLARD FAIRLAMB,
Notary Public.

Corroborating Non-Mineral Affidavits.

State of Colorado,
County of Delta—ss.

John Davis and Henry Welch of lawful age, being duly sworn, each for himself, deposes and says that he is a citizen of the United States, and is well acquainted with the land described in the foregoing non-mineral affidavit, and with each and every legal subdivision therof, having frequently

passed over the same, and that he has no interest therein; that his personal knowledge of said land is sufficient to enable him to testify understandingly with regard to the character thereof; that he has heard read the foregoing affidavit of Henry Burrell respecting the character of said land, and of his own personal knowledge he says the statements made therein made are true.

JOHN DAVIS,
HENRY WELCH.

Subscribed and sworn to before me this 12th day of April, A. D. 1902.

My Commission expire February 12th, 1906.

MILLARD FAIRLAMB,
Notary Public.

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85 (Sheet No. 5, Power of Attorney, Coal Lands—Face.)

Coal Lands.

Power of Attorney.

Know all men by these presents, That I, Edith Cartwright of the County of Delta State of Colorado having, under the provisions of the Revised Statutes of the United States relating to the sale of Coal Lands, made application to purchase the Southwest Quarter of Section One in Township 13 South, of Range 91 West of the 6th Principal Meridian, in the district of lands subject to sale at the land office at Montrose, Colorado, do hereby constitute and appoint Henry Burrell of Delta, Delta County Colorado, my true and lawful agent and attorney, for me and in my name and stead, and for my sole use and benefit, to file the same with the Register of the said Land Office, to make or procure to be made all necessary and proper affidavits and proofs, at any time required, and to file the same in said land office, to make payment for and entry of said land in my name, to do all and singular the acts and things requisite, lawful and proper to be done in the premises, especially to make the required nonmineral affidavit, as I am assured and believe that he is well acquainted with the character of each and every subdivision of said described land; and to procure for me from the United States the receipt and patent for said lands; as fully and completely as I might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid, and to revoke any such appointment; hereby ratifying and

confirming all that my said agent and attorney or his substitute may lawfully do in the premises.

In Witness Whereof, I have hereunto set my hand and
86 seal this 12th day of April, 1902.

MRS. EDYTH CARTWRIGHT.

Signed in presence of Millard Fairlamb.

State of Colorado,
County of Delta—ss.

On the 12th day of April, A. D. 1902, at my office at Delta, Colorado, before me Millard Fairlamb, a Notary Public, in and for the County and State aforesaid, personally appeared Edith Cartwright known to me to be the same person whose name is subscribed to the foregoing instrument, and acknowledged to me that [he] executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

My Commission expires February 12th, 1906.

MILLARD FAIRLAMB,
Notary Public.

(Sheet No. 6, Power of Attorney—back).

Coal Lands.

Power of Attorney of
Edyth Cartwright
CDS No. 655 Ute.
Embracing the SW¼ Sec. 1 T. 13

S. R. 91 W.
Land Office at
Montrose, Colo.
April 16/1902.

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87 (Sheet No. 7, Affidavit as to Payment—face).

Department of the Interior,
United States Land Office, Montrose, Colo.

In the matter of Coal Entry No. 49, Ute Series, made May 7th., A. D. 1902, by Edyth Cartwright.

4—4676

State of Utah,
County of Salt Lake—ss.

I, Edyth Cartwright, being first duly sworn, upon my oath depose and say that I am the Edyth Cartwright, who, on May 7th., A. D. 1902, made Coal Entry No. 49, Ute Series, for the Southwest Quarter of Section One in Township Thirteen South, of Range Ninety One West of the 6th. P. M., I further state that I am not familiar with the character of the land applied for from personal observation, but at the time of filing my declaratory statement for said land I filed the non-mineral affidavit of Henry Burrell, my duly appointed agent, together with two corroborative affidavits which I believed to be sufficient under the law, but that I will forthwith furnish and file in the United States Land Office at Montrose, Colorado, the non-mineral affidavit as to the character of the said land, corroborated by the affidavits of two disinterested witnesses, as required by the order of the Hon. Commissioner of the General Land Office. I further state that I am married and that the money paid in the purchase of the said land was from my own separate estate and was not from funds furnished by my husband, neither was the said entry made for the use and benefit of my said husband.

MRS. EDYTH CARTWRIGHT.

Subscribed and sworn to before me this 22nd day of September, A. D. 1902.

My Commission expires August 26, 1905.

(Seal) ROY V. DRAPER,
Notary Public

88 (Sheet No. 8, Affidavit as to Payment—Back).

Aff't as to
Payment

C. C. E. No. 49—Ute.

Edyth Cartwright

United States Land Office
Montrose, Colorado.

Sept. 24, 1902.

(Sheet No. 9, Application to Purchase Coal Land).

Application to Purchase Coal Land.

I, Edith Cartwright, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale

of coal-lands of the United States, to purchase the Southwest quarter of section One, in township 13 South, of range 91 West of the 6th P. M., in the district of lands subject to sale at the land office at Montrose, Colorado, and containing one hundred and sixty acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held nor purchased lands under said acts, either as an individual or as a member of an association; and I do further swear that I am not well acquainted with the character of said described land, and with each and every legal subdivision thereof, not having frequently passed over the same; that my knowledge of said land is not such as to enable me to testify understandingly with regard thereto; that said land contains large deposits of coal and is chiefly valuable therefor; that there is
89 not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver or copper. I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of Forty Dollars, the nature of said improvements being as follows, to-wit: A tunnel driven twenty feet on the coal vein on said land; and I further depose that I am now in the actual possession of said mines and make entry for my own use and benefit; and not directly or indirectly for the use and benefit of any other party. I further depose that no portion of said land is within fifteen miles of any completed railroad.

EDYTH CARTWRIGHT.

Subscribed and sworn to before me this sixth day of May, A. D. 1902.

MILLARD FAIRLAMB,
Notary Public.

My commission expires Feb. 12, 1906.

(Sheet No. 10, Corroborating Affidavits as to Distance from Railroad—Face.)

State of Colorado,
County of Montrose—ss.

Henry Burrell and Millard Fairlamb of lawful age, being duly sworn, each for himself, deposes and says that he is a citizen of the United States, and is well acquainted with the

land described in the foregoing final Coal affidavit of Edyth Cartwright, Viz: the SW¼ Sec. 1, T. 13 S., R. 91 W., 6th P. M., and with each and every legal subdivision
90 thereof, and that he has no interest therein; that his personal knowledge of said land is sufficient to enable him to testify understanding with regard to the situation and location thereof; that every portion thereof is more than 15 miles from any completed railroad; and of his own knowledge he says the statements made by applicant as to distance from railroad are true.

HENRY BURRELL,
MILLARD FAIRLAMB,

State of Colorado,
County of Montrose—ss.

I hereby certify that the foregoing affidavit was subscribed and sworn to before me, and in my presence, by the above named affiants, creditable persons, who are personally known to me, this 7th day of May, 1902.

JNO. E. PELTON,
Receiver.

(Sheet No. 11, Application to Purchase, and Corroborating Affidavits as to Distance from Railroad—Back).

Application to Purchase
and
corroborating aff'ts as
to distance from railroad.
C. C. E. No. 49—Ute.
Edyth Cartwright.

United States Land Office.

Montrose, Colorado.

May 7, 1902.

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91 (Sheet No. 12, Non-Mineral Affidavit—Face).

Non-Mineral Affidavit.

State of Oregon,
County of Multnomah—ss:

I, Henry Burrell of lawful age, being duly sworn, on oath, say, that I am a citizen of the United States and a resident of Delta County in the State of Colorado, my post office address being at Delta in said County; that I am the duly authorized agent of Edyth Cartwright of Delta, of Delta

County, Colorado, who has, under the provisions of the Revised Statutes of the United States relating to the sale of Coal lands of the United States, made application to purchase the Southwest Quarter of Section One, in township 13 South, of range 91 West of the 6th P. M. in the district of lands subject to sale at the land office at Montrose, Colorado, Colorado; that I am well acquainted with said land, and with each and every legal subdivision thereof, haivng frequently passed over the same; that my actual, personal knowledge of such land is such as to enable me to testify understandingly in regard thereto; that no portion of said tract is in the possession of any other party; and said land contains large deposits of coal, and said tract and each and every legal subdivision thereof is chiefly valuable therefor, and more valuable for coal mining than for agricultural purposes; that there is not to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing sold, silver or copper, and that there is not to my knowledge, within said lands, any valuable deposit of gold, silver, copper, or mineral other than coal. So help me God.

HENRY BURRELL.

92 State of Oregon,
County of Multnomah—ss.

I hereby certify that the foregoing non-mineral affidavit was subscribed and sworn to before me, and in my presence, by the above named affiant, a creditable person, who is personally known to me, this 2 day of Sept. 1902.

My commission expires May 1904.

E. E. COOVERT,
Notary Public.

Corroborating Non-Mineral Affidavits.

State of Montana,
County of Cascade—ss:

Henry Welch and.....of lawful age, being duly sworn, each for himself, deposes and says that he is a citizen of the United States, and is well acquainted with the land described in the foregoing non-mineral affidavit, and with each and every legal subdivision thereof, having frequently passed over the same, and that he has no interest therein; that his personal knowledge of said land is sufficient to enable him to testify understandingly with regard to the character thereof; that he has heard read the foregoing affidavit of Henry Burrell respecting the character

of said land, and of his own personal knowledge he says the statements made therein are true.

HENRY WELCH.

Subscribed and sworn to before me this 6th day of Sept. A. D. 1902.

My Commission expires May 4, 1903.

P. KELLY,
Notary Public.

93 State of Colorado,
County of Delta—ss:

John Davis, of lawful age, being duly sworn deposes and says that he is a citizen of the United States and is well acquainted with the land in the foregoing non-mineral affidavit and with each and every subdivision thereof, having frequently passed over the same, and that he has no interest therein; that his personal knowledge of said land is sufficient to enable him to testify understandingly with regard to the character thereof; that he has read the foregoing affidavit of Henry Burrell respecting the character of said land, and of his own personal knowledge he says the statements made therein are true.

JOHN DAVIS.

Subscribed and sworn to before me this 19th day of September, A. D. 1902.

My commission expires February 12th, 1906.

MILLARD FAIRLAMB,
Notary Public.

(Sheet No. 14, Non-Mineral and Corroborating Non-Mineral Affidavits—Back).

Coal Lands.

Non-Mineral
and
Corroborating Non-Mineral Affidavits
of
Edyth Cartwright,
- Delta, Colo.

SW ¼ Sec. 1, Twp. 13 S. R. 91 W. 6th P. M.
United States Land Office,

Montrose,
Colorado.

Sept. 20th, 1902.

94 (Sheet No. 15, Register's Final Coal Certificate of Entry—Face).

Register's Final Coal Certificate of Entry.

Coal Entry No. 40 Ute. Land Office at Montrose, Colo.

May 7th, 1902.

It is hereby certified that in pursuance of the Revised Statutes of the United States relating to Coal Lands Edyth Cartwright, residing at Delta, in Delta County, State of Colorado, on this day purchased of the Register of this Office the SW¼ of Section No. one (1) in Township No. 13 S. of Range No. 91 West of the 6th Principal Meridian, containing 160 acres, at the rate of ten dollars per acre, amounting to sixteen hundred dollars and no cents, for which the said Edyth Cartwright has made payment in full as required by law.

Now, therefore, be it known that, on the presentation of this certificate to the Commissioner of the General Land Office, the said Edyth Cartwright shall be entitled to receive a Patent for the land above described if all be found regular.

J. A. LAYTON, Register.

Patent to contain reservation according to proviso to the Act of Aug. 30, 1890.

(Sheet No. 16,—Register's Final Coal Cer. of Entry—Back).

Edyth Cartwright

Coal Land
Coal Entry No. 49 Ute

Cash Entry.
Approved.

Land Office At
Montrose, Colo.
May 7, 1902.
Sec. 1 Tp. 13 S. Rg. 91 W.

Pat. Oct. 16, 1902
Rec. Vol. 453 page 3.
Miscellaneous Volume.

95 (Sheet No. 17, Patent).

General Land Office. Coal Certificate.

No. 1814. No. 49 Ute Series.

The United States of America,

To All To Whom These Presents Shall Come—Greeting:

Whereas, in pursuance of the Revised Statutes of the United States, there has been deposited in the General Land Office of the United States the certificate of the Register of the Land Office at Montrose in the State of Colorado, whereby it appears that Edyth Cartwright did on the seventh day of May, A. D. 1902, enter and pay for the South West quarter of Section one, in Township thirteen South of Range ninety-one West of the Sixth Principal Meridian in Colorado, embracing one hundred and sixty acres of land, more or less, as shown by the official plat of the survey of said land returned to the General Land Office by the Surveyor General. The same being Coal Entry No. 49 in the Ute series of said Office.

Now know ye, That the United States of America, in consideration of the premises, and in conformity with said Act of Congress, Have Given And Granted, and by these Presents Do Give And Grant, unto the said Edyth Cartwright and to her heirs the said Tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Edyth Cartwright and to her heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged
96 by the local customs, laws, and decisions of the courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the Authority of the United States.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the sixteenth day of October, in the year of our Lord one thousand

nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

By the President:

T. ROOSEVELT,

By F. M. McKean, Secretary.

L. S.

C. H. Brush,
Recorder of the General Land Office.

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97 When I deeded the lands entered by me I thought I sold my coal right to the people that papa was working for. Papa is the only one I talked to concerning the making of the entry or deeding the land. Do not remember how my money came; know I received $25; this was all I received for my deed. Papa was the one that promised me the $25. Received the $25. about ten days after I signed the papers in Mr. Fairlamb's office. Never visited the lands nor did any development work on them. Never knew but one Mr. Burrell; his name was Henry and he was the one that came to our house. Knew Ella Davis; she was my step-mother, and is now dead. Heard my father talk with her about a coal land entry but can't remember what was said. My step-mother made an entry. I never paid the government anything for my entry; Do not know who made the payment. Am well acquainted with Mr. Millard Fairlamb, have known him ever since I was a child. Mr. Fairland did not come to my house in Salt Lake City to have my paper signed. Do not remember that he witnessed any paper in Salt Lake City nor that I signed any paper in Salt Lake City in his presence. A few days before the Government agents came to my house in Meeker in interest of the Government, Mr. Fairlamb came to my house in Meeker and told me to say as little to them about the transactions relating to my entry as possible.

(Objected to by defendants as hearsay, incompetent and irrelevant).

Cross-Examination.

My father brought a gentleman to our house in Delta whom he introduced as the Big Mogul, the man with the money. His name, I think, was Molson. I never refused to tell all I knew concerning my entry and the facts in connection therewith to any representative of the government.

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98 DANIEL S. BALDWIN testified for the plaintiff:

Am a carpenter and joiner. Made an entry of coal lands at the suggestion of John Davis. He told me there was

$25. in it. Never visited the lands and don't remember paying anything for them. I made a deed for the land and received $25. credit from John Davis on a debt due to him. Do not remember to whom I deeded the land but I never received anything except $25. in connection with the transaction.

Certified copies of filing papers covering the entry of the witness to the east half of the southwest quarter of section seven and northeast quarter of the northwest quarter of section 18, township 13 south, range 90 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit B, and introduced in evidence. These papers are similar to those in Plaintiff's Exhibit A, in the testimony of witness, Edyth Cartwright, Henry Burrell acting as Attorney in fact. Patent dated, September 6, 1902.

Never did anything in connection with the lands except to sign papers for the entry and make the deed.

Cross-Examination

I never refused to tell all I knew concerning this entry or the facts in connection therewith to any officer or agent of the United States government.

DAVID S. HENSLER testified for the plaintiff:

Am a saddle maker. Knew John Davis. He told me he would pay me $25. to file on some coal lands. I made an entry.

Certified copies of papers covering northeast quarter of section 27, township 13 south, range 91 west, sixth principal meridian, were identified by the witness and marked Plaintiff's Exhibit C, and introduced in evidence. These
99 papers are similar to those in Plaintiff's Exhibit A, in the testimony of Edyth Cartwright, sheets 3, 4, 5, and 6, Henry Burrell acting as Attorney in fact.

Signed these papers at the request of John Davis and received $25. for doing so. Did not intend to carry this entry to final patent. Knew Dora B. Hensler; she was my wife. She made coal declaratory statement under same circumstances as I did. She received $25. for making statement and did not carry it to final patent herself. She did not make entry for her own use.

Certified copies of papers covering the filing of Dora Hensler on the southwest quarter of Section 29, Township 13 south, Range 91 west, sixth principal meridian, consisting of four sheets of paper, were identified by the witness, marked Plain-

tiff's Exhibit D, and introduced in evidence. These papers are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright, Sheets 3, 4, 5, and 6, Henry Burrell acting as attorney in fact.

Did not pay any fees in connection with making and filing these papers.

LIONEL WIGRAM testified for the plaintiff:

Certified copies of papers covering filing of Lionel Wigram to southeast quarter of section 16, township 13 south, range 91 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit E, and introduced in evidence. These papers are similar to those set forth in Exhibit A in the testimony of witness Edyth Cartwright, Sheets 3, 4, 5, and 6, Henry Burrell acting as attorney in fact.

Am City Commissioner.

Executed those papers with the understanding that I was to receive $25. for the land, and I believe I received this amount. Do not remember from whom I received the money, but I did not pay any fees to anyone in connection with making and filing the statements. Do not believe I intended to perfect the entry or secure patent.

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100 EMMA F. NUTTER testified for the plaintiff:

Made an entry at the suggestion of my son-in-law, Millard Fairlamb. Was told I would be able to sell the land.

Certified copies of papers covering this entry to the south half of the northeast quarter, section 12, township 13 south, range 91 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit F, and introduced in evidence. These papers are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright, Henry Burrell acting as attorney in fact. Date of Patent, October 16, 1902.

Did not know Frankie Gaddis, my assignor. Did not negotiate with her or pay her anything for the quitclaim deed. Did not pay any money in connection with the lands or this filing or entry. Deeded these lands to Alexander Burrell. Millard Fairlamb carried on the negotiations and I received $25. from him for my deed. Never saw or developed the land which I entered and never had any intention of taking up coal land for my own use and benefit.

Cross-Examination.

Q. Mrs. Nutter, did you at any time ever refuse to tell all you knew concerning your entry, to any representative of the Government, or any other person?

A. There was a man came around, and it was dim in my memory—the time I made the filing, and I told him things that were not quite true; because they told me afterwards; and I didn't have any record of it. The Government man came perhaps one time, and he confused me so and asked so many questions that probably I told somethings that were not really true about it.

Q. The question was, did you ever refuse to give to any representative of the Government all the information you had?

A. No, sir, I think not. This Government man that came to the house, I told him all I knew about it. I didn't know very much. Couldn't say very much.

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101 ANNA NUTTER testified for the plaintiff:

Certified copies of papers covering entry to southwest quarter of the southeast quarter of section 7, and northwest quarter of the northeast quarter of section 18, township 13 south, range 90 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit G, and introduced in evidence. The papers contained in this exhibit are similar to those in Plaintiff's Exhibit A, in the testimony of Edyth Cartwright, Henry Burrell acting as attorney in fact, Date of Patent, September 6, 1902.

Made an entry at the suggestion of Millard Fairlamb. He told me if I would make the entry I could probably sell it. Sold the lands to Alexander Burrell and received $25. Never paid any money to anyone for this entry and was never on the land. Got the description from Millard Fairlamb. Did not know Alexander Burrell. The negotiations were carried on by Millard Fairlamb. Never had any intention of carrying the entry to patent or paying the United States for the land.

Cross-Examination.

Q. Miss Nutter, did you at any time refuse to give any officer or agent of the United States Government, any information or facts which you might have with reference to this transaction? A. I think not.

Redirect Examination.

Q. Do you know Mr. Ralph S. Kelley, Special Agent of the General Land Office? A. No, sir.

Q. Do you remember of a man visiting your house along about the 21st of January, 1909, and asking you about this entry?

A. Yes, sir. Some man, but I don't know whether that is the time or not.

Q. No one had ever called on you for a statement before that had they? A. No, sir.

Q. Nor has since then? A. No, sir.

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102 OSCAR D. GILBERT testified for the plaintiff:

Certified copies of papers covering filing on the northwest quarter of section 21, township 13 south, range 91 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit H. and introduced in evidence. This exhibit includes three papers, only, relating to coal declaratory statement, which are similar to these in Exhibit A, in the testimony of witness Edyth Cartwright, Sheets 3, 4, and 5, Henry Burrell acting as attorney in fact, Papers filed March 17, 1902.

John Davis suggested that I make an entry and said it would be worth my while. No amount of money was agreed upon and I never received any money for signing papers. I do not know whether the entry went to patent. Did not have any intention of getting myself; thought I would re-
103 ceive $25, or more. Was to receive the $25. after I sold the land.

CHARLES P. NUTTER testified for the plaintiff:

Certified copies of papers covering filing on northeast quarter of the southwest quarter, section 12, township 13 south, range 91, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit I, and introduced in evidence, The papers contained in this exhibit are similar to those in Plaintiff's Exhibit A in the testimony of witness Edyth Cartwright, Henry Burrell acting as attorney in fact Date of Patent, October 16, 1902.

Millard Fairlamb first talked to me about making an entry and he gave me the description of the lands. Never visited the lands or hired anyone to do work on them. Sold my filing to Alexander Burrell for $25; Millard Fairlamb arranged the details. Never paid any money to the United States and never authorized anyone to pay for me. Never intended to pay the Government for the lands. Never had any intention of doing anything with the lands but sell them. $25. is all I received for the lands.

Cross-Examination

Q. Did you at any time conceal, or attempt to conceal, from the Government, or any of the agents or officers of the Government, the true facts with reference to this entry that you made?

A. No, I never have spoken to any of them in regard to it at all. Never visited me.

Redirect Examination

Mr. Williamson called on me some ten days ago, "but I didn't consider him in that light—in the light of a detective." We had a little talk.

Q. Have you ever discussed the matter with Mr. Fairlamb since you made the entry or with Mr. Burrell?

A. We talked it over in regard to the time it was. I
104 asked him how long about and he told me twelve years ago.

Q. And you had this conversation recently with him?

A. Yes, sir.

Q. Did you have any conversation with Mr. Millard Fairlamb in regard to your entry some years ago. Probably in 1909?

A. No, I think not. Not that I can remember.

A. C. REMINGTON testified for the plaintiff:

Certified copies of papers covering filing on the north half of the southeast quarter, section 10, township 13 south, range 91 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit J, and introduced in evidence. This exhibit consists of three papers—declaration of intention to purchase coal lands, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A in the testimony of Edyth Cartwright, Sheets 3, 4 and 5. Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

Do not remember who talked to me about making a filing, for whose benefit it was made, nor how much money I received, but I think I did receive some money. Do not know who furnished the description of the lands nor who carried the matter on after I made the filing, or from whom I received the money. Signed these papers in Millard Fairlamb's office.

Cross-Examination.

Never concealed nor attempted to conceal the true facts from the Government or any agent or officer.

CALEB B. ELLIOTT testified for the plaintiff:

Certified copies of papers covering filing on the northwest quarter of the northeast quarter and the northeast quarter of the northwest quarter of section 22, township 13 south,
105 range 91 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit K, and introduced in evidence. This exhibit consists of three papers —coal declaratory statement, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A in testimony of Edyth Cartwright, Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

Knew John Davis and Millard Fairlamb. Do you remember how I came to make the filing, nor how description of lands was secured. Think I received $25. for the claim. Do not remember from whom. John Davis was one who talked about filing. Did not intend to prove up the entry if I could get out of it before. Never received anything but $25. for the filing and never paid any fees in connection with the entry. My intention was merely to sell my filing right.

Cross-Examination.

Never refused to discuss the matter of my entry with any officer or agent of the government, nor did I attempt to conceal any facts in connection therewith. Never discussed it with anyone.

STELLA M. FAIRLAMB testified for the plaintiff:

Certified copies of papers covering filing on the west half of the southwest quarter of section 7 and the west half of the northwest quarter of section 18, township 13 south, range 90 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit L, and introduced in evidence. This exhibit contains papers similar to those enumerated in Plaintiff's Exhibit A in the testimony of witness Edyth Cartwright, Henry Burrell acting as attorney in fact. Date of Patent, September 6, 1902.

106 Millard Fairlamb, my husband, first spoke to me about making an entry. Don't recall exact conversation but general purport was that a great deal of coal land was being located that I could locate if I wished to. My husband furnished the description of the land entered. Spoke to a number of people about my entry but never had any conversation with John Davis in regard to it. It was impressed upon me that I could do as I pleased with the land—keep it or sell it. Finally sold it and received $25. My husband brought me

the money. Sold the land to Alexander Burrell but did not receive $1800 for the deed and did not know Alexander Burrell personally. My husband carried on the negotiations and handled all business in connection with the entry. He had money of mine in his hands at that time. Do not know whether he had as much as $1483.40. Never visited the land myself. My husband told me I could sell the lands to Alexander Burrell if I wished to. My husband never told me he paid $1483.40 to the government for the lands. Never had any other money transaction in connection with this entry other than the $25. I received when I sold the lands to Alexander Burrell. I discussed the matter of making the entry freely with my friends and relatives.

Cross Examination.

Never refused to tell all I knew about the entry to any officer or agent of the United States government. No agent of the government ever asked me about it.

EMMA A. FAIRLAMB testified for the plaintiff:

Certified copies of papers covering filing on the northeast quarter of section 28, township 13 south, range 91 west, sixth principal meridian, were identified by the witness and marked Plaintiff's Exhibit M, and introduced in evidence. This exhibit consists of three papers—declaration of intention
107 to purchase coal lands, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A in testimony of witness Edyth Cartright, Sheets 3, 4 and 5, Henry Burrell acting as Attorney in fact. Papers filed March 17, 1902.

Am the mother of Millard Fairlamb. My husband was the first one who talked to me about making an entry. My son brought the papers to me and my husband told me I had the privilege of entering a mining claim and that he had done so. He did not tell me what amount of money I would receive and I never received anything. Did not have sufficient funds of my own to pay for the land at ten dollars per acre. I hoped to make some money out of the claim by selling it. I didn't carry the entry to patent because I understood it was not promising—that it would not pay to go further with it. Received $25. for my abandoned claim. Received that for the land. The $25. I think was in cash. My husband brought this money long after I abandoned the claim.

S. L. FAIRLAMB testified for the plaintiff:

Certified copies of papers covering filing on the south half of the northeast quarter and the south half of the northwest quarter, section 22, township 13 south, range 91 west, sixth principal meridian, were identified by the witness and marked Plaintiff's Exhibit N, and introduced in evidence. This exhibit consists of three papers—the coal declaratory statement, non-mineral affidavit and power of attorney, and are similar to those in Exhibit A, in the testimony of Edyth Cartwright, Sheets 3, 4 and 5, John Davis acting as attorney in fact. Papers filed March 15, 1902.

Millard Fairlamb is my son. Knew from John Davis that the land was coal. Nobody suggested that I make the filing. Think it was turned over to another party and then I was paid $25. by check signed by Henry Burrell. Had the
108 impression when I filed on this land that the purpose was to go ahead and develop it and I suppose I had an interest to that extent in it, and if it had been carried out I would have been in that organization at the present time. Changed my mind when I found it was for a different purpose. Gathered this only in a general way. All the others who had filed were dropped out. Did not execute the papers with the expectation of selling my right. I changed my intention after I knew more about the matter. Henry Burrell did not say anything when he handed me his check for $25. Understood it was for my connection with the making out of the papers. Did not receive any money for the declaratory statement made by my wife but she received $25. from Mr. Burrell. It was in a check handed to me and I handed it to her. Don't know the reason why she was paid, but presume it was the same as in my case. My wife advised and consulted with me about making her entry and in regard to the sale of her rights. Received $25. after I learned I could not get into the organization myself, which was my purpose in the beginning. Then I concluded to sell and get out. I did not sell or receive the money until long after I executed the declaratory statement and power of attorney. The parties to the organization were Mr. Davis and Mr. Burrell and a couple of them here. Would have liked to have gotten into the organization—had that purpose in mind when I made the declaratory statement.

MILLARD FAIBLAMB testified for the plaintiff:

Certified copies of papers covering filing on the southwest quarter of Section 22, township 13 north, range 91 west, sixth

principal meridian, were identified by the witness, marked Plaintiff's exhibit O, and introduced in evidence. This exhibit consists of three papers—declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright, Sheets 3, 4 and 5 John Davis acting as attorney in fact. Papers filed March 17, 1902.

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Got the description of the land covered by my entry from John Davis. Had business relations with Mr. Davis. No one requested me to make the declaratory statement. Made it voluntarily. Didn't pay John Davis for opening up the claim but I directed him to do so. Never received any money for making out the papers. Later I received a donation of $25 that I got from Henry Burrell. Viewed it as a donation. Gave no instrument of any kind for it. Had acted as attorney for Mr. Burrell and had made trips to the Land Offices at Gunnison and Montrose and had done various legal work for him, but the $25. was a present from Mr. Burrell. Presume I received the money on account of the fact that I had made an entry although in making it there was no agreement of any kind. Didn't carry the entry to patent because my agent, John Davis, had selected for me a piece of land where the coal was burnt out. Was told the coal was apparently in place but on driving in on it, it became ash and was no good. At the time my filing was made Mr. Davis did not represent any corporation or person whatsoever, save myself. Knew Henry Burrell—became acquainted with him on the 7th of March, 1902. Never became acquainted with Alexander Burrell. Did know Mr. C. A. Molson—met him on his first trip to Delta between the 16th and 24th of April, 1902, The first thing I knew about these coal lands was from John Davis. He came to me about February 1, 1902, and said he and some of his friends and relatives wanted to file on some coal lands in the North Fork country and wanted to know if I would make out the filing papers for him. I said I would but he was going to the North Fork country and I didn't see anything of him for several weeks. At the end of that time I met him on the street and he told me he would be in in a few days to have some filing papers made out. In a week or ten days he returned from Salt Lake and came to my office and introduced Mr. Burrell to me. He took Mr. Burrell to the North Fork Country and I think it was up there that Mr. Burrell first employed me, about March 7, 1902, to get township plats from the General Land Offices at Montrose and Gunnison. Think I made a special trip for that purpose. Between the 18th and 24th of April, 1902, Mr.

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Burrell introduced Mr. C. A. Molson to me and told me they were making a trip to the North Fork country. They stopped in Delta to get a team. It took three or four days to go up there and look over the land. Understood Mr. Burrell and Mr. Davis were trying to interest Mr. Molson in the purchase of the land. Mr. Molson had a large number of samples which he was taking away for assays. My recollection is I met Mr. Burrell at my office on March 15, 1902. Had a letter from him on the 7th of March asking me to get these township plats. Was employed by him at that time. John Davis told me he had met Mr. Burrell on a trip to Salt Lake City through a brother-in-law of his—one Pat Donohue—and that he was trying to interest Mr. Burrell with him in some coal lands in the North Fork country. The coal lands involved in this suit are in the North Fork country. Mr. Burrell did not tell me whether he represented any other persons than himself in the transactions relating to the coal lands. I understood Mr. Burrell was there on his own behalf, and up to the time Mr. Molson had been in Salt Lake City for some days after getting the samples of coal from the North Fork country, that Mr. Burrell was not acting for any one other than himself. I was employed by Mr. Burrell in my professional capacity in connection with the acquisition of titles to the lands involved in this suit. Such information as I received no doubt was received from both Henry Burrell
111 and Mr. C. A. Molson, representing the Exploration Company, Limited. John Davis first spoke to me in regard to making out the papers but the fees for taking the acknowledgments were charged to Mr. Burrell.

Certified copies of papers covering filing of Henry Welch on the south half of the southwest quarter, section 13, and the south half of the southwest quarter, section 14, township 13 south, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit P. and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of Edyth Cartwright, Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 15, 1902.

Certified copies of papers covering the filing of Charles Lee Owens on the southwest quarter, Section 33, township 13 south, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit Q, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit and power of attorney, and

are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright, Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 15, 1902.

Certified copies of papers covering the filing of David W. Holmes on the southeast quarter, Section 28, township 13 south, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit R, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit and power of attorney and are similar to those in Exhibit A, in testimony of witness Edyth Cartwright, Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

112 Certified copies of papers covering the filing of Thomas B. Hanoum on the east half of the southeast quarter, section 21, township 13 south, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit S, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of Edyth Cartwright, Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

Certified copies of papers covering the filing of Mary F. Moore on the west half of the northeast quarter, section 21, township 13 South, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit T, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright, Sheets 3, 4, and 5, Henry Burrell acting as attorney in fact. Papers filed March [March] 17, 1902.

Certified copies of papers covering the filing of Anna Walser on the southwest quarter, section 10, township 13 south, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit U, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright, Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

113 Certified copies of papers covering the filing of Arthur S. Cartwright on the northwest quarter of section 27, township 13 south, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit V, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright, Sheets 3, 4, and 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

Certified copies of papers covering the filing of Mary E. Cook on the northwest quarter of section 33, township 13 south, range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked plaintiff's Exhibit W, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of witness Edyth Cartwright Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

Certified copies of papers covering the filing of Annie H. Hanoum on the southwest quarter of section 16, township 13 south range 91 west, sixth principal meridian, were identified by the witness as having been executed before him as a Notary Public, marked Plaintiff's Exhibit X, and introduced in evidence. These papers consist of declaration of intention to purchase, non-mineral affidavit, and power of attorney, and are similar to those in Exhibit A, in the testimony of Edyth Cartwright, Sheets 3, 4 and 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

The fees for the acknowledgments to these papers, Exhibits P to X, inclusive, were paid by John Davis and he directed the several persons to appear before me with the exception of Anna Walser (Plaintiff's Exhibit U) who was a steno-
114 grapher in my office and she voluntarily made out her own affidavit and filing. Ran out of printed copies of affidavits and made carbon copies to fill out the sets. The papers were run off in blank and later, pen and ink descriptions of the lands were filled in. Got the number of the township and range from Mr. Davis and I think all the entries are in township 13 south of range 91 west of the sixth principal meridian. The lands are not all practically contiguous—some are on the north side of the river and some on the south side. A wide strip of country lies between—perhaps half a mile to

a mile wide. Think all the lands covered by Exhibits Q to X are in township 13 south of range 91 west of the sixth principal meridian. These lands covered by these exhibits join those in suit, and all are within a radius of two or three miles from the lands in suit—eight or nine miles northeast of the town of Paonia, now about a mile and a half from the village of Bowie. After these filing papers and the entry papers relating to the lands concerned in this entry were prepared and sworn to in my office, they were taken to the Land Office by Henry Burrell, John Davis and myself. All the filing fees were paid by Henry Burrell, possibly except those of John Davis and his wife and Edyth Cartwright. Later I conducted the negotiations with the persons who made the entries—preparation of the deeds and the payment of a number of persons for their deeds, and procuring of the patents from the Land Office.

JOHN DAVIS testified for the plaintiff:

Lived at Delta, Colorado, about 23 years and left there last spring a year ago. Was in the coal mining business and ran a hotel. Am familiar with the lands situated in township 13 south, ranges 90 and 91 west, sixth principal meridian, in Delta and Gunnison counties, Colorado; first became acquainted with these lands along in 1890; made an examination of these lands to determine whether they contained coal.

115 Was always interested in coal mines and operated a coal mine in Colorado, in Delta county. In 1890 there was considerable excitement over coal lands in that vicinity and a good many persons, corporations and associations were engaged in acquiring such lands. Mr. P. J. Donohue was the first one who talked to me about going out to these particular lands to look them over. Mr. Donohue resided in Salt Lake City at that time and is my brother-in-law. Mr. Donohue got me to go back and get samples of the coal and send it to him. This was in March, 1902, I think. Up to that time no filings had been made on any of this land and no arrangement had been made with any person to make such filings. After I sent the samples to Mr. Donohue they were assayed and Mr. Donohue and Mr. Henry Burrell came down to Delta. Later Mr. Burrel came to Delta and I made a further investigation of these lands. This was done under instructions from Mr. C. A. Molson. Was employed by him through my brother-in-law, Mr. Donohue. Mr. Molson was not present in Delta on the first trip that Henry Burrell made with Mr. Donohue. Took them up to the coal lands and we just looked over the land. Mr. Burrell and Mr. Donohue then went back to Salt Lake

City. Three or four days afterwards Mr. Burrell came back by himself and I made arrangements with him to go on and file on this land. Mr. Molson came to Delta about two or three weeks after that time. Mr. Burrell and I went around and looked up the records, got plats of the vacant land and then we went back and started making our locations and filings. Mr. Millard Fairlamb procured these plats from the Land Office for us. Mr. Burrell and Mr. Fairlamb became acquainted on the car at the depot; I introduced them to one another. Mr. Burrell wanted a lawyer and Mr. Fairlamb was on the platform, so I introduced them. Mr. Fairlamb afterwards made out the filing papers on the coal lands that we filed upon and located. These lands were in township 13 south,
116 ranges 90 and 91 west. Had no contract or agreement or understanding with Mr. Burrell for the securing of title to these coal lands, Mr. Burrell was sent back there (Delta) to me from here (Salt Lake City). Was not employed by Mr. Burrell at all. After I found out what land was vacant I asked several persons to make coal declaratory statements and filings on these lands. There might have been five or six in all—I don't remember. Did not become acquainted with Mr. Molson until two or three weeks after that time. Met Mr. Molson at Paonia and was employed by him. This employment was through Mr. Donohue but I say Mr. Molson personally. Mr. Donohue and I were to get 20 per cent. of the amount paid the government for these lands for locating the lands. This arrangement was made with Mr. Molson and he was to pay the 20 per cent. Mr. Molson never told me that he was acting for any other person, association or corporation than himself, but Mr. Donohue told me he was working for the Exploration Company. (Objected to by defendants as hearsay, incompetent and irrelevant). Molson told me he was superintendent or representative of that company in the United States. Under the agreement which I made I was to locate the coal land and Mr. Molson was to take it after I got it located. Henry Burrell told me it was for the Exploration Company. (Objected to by defendants as hearsay, incompetent and irrelevant). Before I secured the parties to
117 make the filings on the lands there was no arrangement that the lands were to go to the Exploration Company. Henry Burrell was employed by Mr. Molson. When Mr. Molson came out to the lands he put me in charge. I took him over the lands and showed him the locations. I showed him where I should open up on the ground provided they should make up their minds to open it.

Certified copies of papers covering entry of John Davis on the northeast quarter of section 13, township 13 south, range

91 west, sixth principal meridian, were identified by the witness marked Plaintiff's Exhibit AA and introduced in evidence. The papers contained in this exhibit are similar to those in Plaintiff's Exhibit A in the testimony of witness Edyth Cartwright, Henry Burrell acting as attorney in fact. Date of Patent, October 16, 1902.

Certificate copies of papers covering entry of Ella Davis on the southeast quarter of section 12, township 13, south, range 91 west, sixth principal meridian, were identified by the witness, marked Plaintiff's Exhibit BB and introduced in evidence. The papers contained in this exhibit are similar to those in plaintiff's Exhibit A in the testimony of witness Edyth Cartwright, Henry Burrell acting as attorney in fact. Date of Patent, October 16, 1902.

Ella Davis was my wife. She is now dead. Am familiar with her signature and the signature to these papers looks like her signature. Talked to her about making this entry and Henry Burrell talked to her and I think Mr. Fairlamb did too. The intention of my wife and myself in making this entry was to pay for it ourselves. Did not intend to turn it over to any one. I wanted the half section and got it together. Mrs. Davis never got anything for this entry. Mr. Fairlamb promised to pay her $25. but never did. I deeded the lands embraced in my entry but don't remember to whom. Millard Fairlamb told me the person to whom I should deed the land. Did not want to sign it over; wanted to prove up on it myself. Made the deed to my lands in the latter part of June or July. Did not pay the $1600 to the government for these lands and I don't know who paid that money, and I never received a government patent. The reason I
118 did not prove up was that they got her (my wife) to sign her right away and that left only one quarter for me. Did not like that because I wanted to prove up on a half section. Changed my intention quite awhile after Mrs. Davis signed away her right. The money for my location work was sent to me through Mr. Fairlamb. Mr. Molson never had any communication with me in any shape; it all went through Fairlamb. He made me sign my interest over to the Company before he would give me the money for my work in exploring the land. The money was paid to me by a draft and I went to the bank and drew it. It was drawn upon some New York bank. Received something over $1300. This was the amount due me for services in development work. Did not receive anything for making the entry. Alexander Burrell never paid me a cent in his life and no one else paid me for my deed to the lands. My wife, Ella Davis, did not pay the government $1600 for her entry and I don't

know who paid it for her. Henry Burrell and Millard Fairlamb promised to pay her $25 for making the entry. Was promised $25 by Burrell and Fairlamb. Have seen Alexander Burrell but I did not carry on any negotiations with him in connection with deeding my coal land to him. I never made any arrangements with him by which my wife deeded her lands to him. Had a conversation with Arthur Cartwright in regard to filing a declaratory statement. He was promised $25 and was paid this amount by Burrell I think. Had a similar conversation with Avon C. Remington and he was paid either by Fairlamb or Burrell. Had a conversation with Mary E. Cook about making a declaratory statement. She wanted to know how much there was in it and I told her $25. She afterwards made a declaratory statement. Knew Stephen A. Boyes; had a conversation with him in regard to filling
a declaratory statement. Made the arrangements with
119 him and promised him $25. Did not pay him a cent
myself. Knew William H. McKinley and James B. Hanoum. Don't remember having any conversation with them. Knew Caleb B. Elliott. Got him to file and promised him $25. Don't know of my own knowledge whether he received that. Knew Dora B. Hensler and David H. Hensler and arranged with them for their [entires]. Told them if they would make their statement they would get $25 apiece for it. When I made arrangements with these various people I didn't tell them to whom the lands were to ultimately go, because I did not know. Knew Frankie Gaddes; she was the mother-in-law to Steve Boyes. Made the arrangements with her for her filing. She was promised the same thing—$25. Went around and got people to file because Mr. Burell wanted me to. Was present at the Mortrose Land Office when the entry papers were filed. Was there several times for that purpose. Don't know how many different sets were filed. The promise of $25 to these several people for making their declaratory statements was made before they executed them and before we took the papers to the Land Office to file. When these filings were made in the Land Office at Montrose I did not tell the Register and Receiver or any official in that office of the arrangements or the promises which I had made with the several people who were filing. These people were sent to Fairlamb's office to have their papers written. The fees for filing these papers came from Henry Burrell. Henry Burrell authorized me to promise the several persons $25. Mr. Molson agreed to pay me 10% for all the coal that I located, and I received extra money from him for working on the lands, including my expenses. On the first trip up to the lands there was some talk between Mr. Donohue and Mr. Burrell about the Exploration Company. Mr. Burrell said he

was in their employment. (Objected to by defendants as hearsay, incompetent and irrelevant.) Went to Mr. Fairlamb for advice and counsel while I was carrying on the
120 matters pertaining to these entries. Fairlamb was employed by Burrell. At the time the entries of Emma F. Nutter, Charles P. Nutter, Stella Fairlamb and Anna Nutter were made I knew that they had entered on a part of the lands. Heard that Maggie E. Holmes had made entry on a part of the land; I knew of her filing anyway. Don't know whether she was in this territory or not or whether they filed her over on the east side of the river; know that she filed. All of the entries and filings that we made were upon lands embraced in township plats that Fairlamb procured at the Gunnison Land Office and at the Montrose land office. Those coal declaratory statements that were not carried to final patent was because the lands were no good. All the entries that were carried to patent were located on the west side of the river and were examined and approved by me.

On Cross-Examination the Witness Testified as Follows:

When I made my entry I intended to follow up that entry and obtain title to the land from the government. The intention of my wife, Ella Davis, with reference to her entry was the same as mine. We had sufficient money of our own at that time to pay the government for the land which we had entered. At the time we made our entries there was no agreement between us that we should transfer our rights to any other persons. There was no agreement between the various entrymen whom I secured to make filings that they should transfer their filings to some other persons, at the time they made the entry. There was nothing said to the entrymen that I talked to about transferring their filings after making the entry. At the time we filed the papers with the land office at Montrose, neither the Receiver or any other officer or agent representing the government asked us anything about any arrangements with reference to these entries. Never at any time that I know of from the inception of this trans-
121 action to the present time, refused to tell any agent or officer of the United States government all I knew about these entries and this transaction. There was no understanding or agreement with the entrymen that the true facts with relation to these entries should be concealed from the government. Neither my wife nor I or any other person connected with this transaction, as far as I know, concealed or attempted to conceal the true facts. Never knew of any intention on the part of Henry Burrell, Alexander Burrell, Mr. Molson or the Exploration Company to keep secret these transactions.

On Re-direct Examination the Witness Testified as Follows:

Did not know that there was any secrecy about it. Did not know what their intentions were. Never paid anything into the Land Office on my entry, nor did my wife. Always calculated to pay for my entry, but they would not have it that way. They got my wife to sign her right away. Then I decided to let them have mine. Don't know whether this was before or after the money was paid in the land office. The $25 given to the people who made the coal declaratory statements was to pay for their signing away their right.

PATRICK J. DONOHUE testified for the plaintiff:

I now reside in Salt Lake City; have resided here since 1892. My occupation is mining engineer and millwright. I have followed this occupation about forty years or over. I first visited Delta, Colorado, in the fall of 1901. I made a trip in my professional capacity into the San Juan country and stopped off in Delta to talk with Mr. Davis about this coal land. He had been in Salt Lake and told me about it James A. Murray, of Butte, told me that he would like to get hold of a good coal proposition and I went there to see the coal land after Mr. Davis left a sample with me. These samples were shown to me in October or November of 1901.

122 I knew Mr. Henry Burrell at that time; had known him and his brother since 1886. His brother is Alexander Burrell. I knew Mr. C. A. Molson and Mr. R. G. Bayliss. The next time I visited Delta was in January or early in 1902. I went there under arrangements with Mr. Molson and took Henry Burrell up there to examine the coal outcrops and verify my statements as to them. During a talk with Mr. Molson I mentioned this coal property; asked him why the Exploration Company did not take it up. He said the Exploration Company would tackle that and that he would write to Mr. Alexander Burrell to let me know. (Objected to by defendants as hearsay, incompetent and irrelevant.) A few days afterwards he called me on the telephone and asked me to come down to the office in the Dooley Block and I went there and entered into the agreement with him. Mr. Molson was the examining engineer for the London Exploration Company and on his office door was "London Exploration Company, C. A. Molson, Engineer." His office was on the sixth floor of the Dooley Building, Salt Lake City. I had conversations very often with Mr. Molson as to his connection with the Exploration Company. He told me he was connected with the buying of the Elkton Mine at Leadville, the examination of the Johnny mine at State Line and he was trav-

elling all the time for the Company. Mr. Molson examined the Elkton Mine at Leadville and bought it for the Exploration Company. He was connected with the examination of the El Oro, in Mexico, and the Esperanza. These properties were afterwards purchased by the Exploration Company. He was connected with the Tomboy, both in the examination of it and afterwards in the management. The Tomboy was taken over by the Exploration Company. The Tomboy is located at Telluride, Colorado. Mr. Molson continued to keep his office in Salt Lake City until the time of his death. He was accidentally killed while out on a hunting expedition in Wyoming. The contract which I entered into with Mr. Molson was in the possession of my lawyer, George L. Nye. I
123 do not have a copy of that contract in my possession.

Mr. Nye left his business with Mr. Ingebrestsen when he moved to Denver and I took the matter of obtaining possession of the original contract up with Mr. Ingebrestsen and he said he would look it up but he did not know where it was at that time. I have not been able up to this time to get hold of the original contract. The contract was executed in duplicate. I kept one copy and Mr. Molson the other. I have been making efforts to get the copy of the contract since I found it might be possible to connect the London Exploration Company with the transaction. The Burrells and Molson, in order to befog and not give me the ten per cent. which I was entitled to by the contract, had the property placed in the [named] of other people. I tried to get Mr. Davis to send me the names at the time and he agreed to do so but he was unable to procure all the names at the time. I know Alexander Burrell very well; have known him since 1887. Alexander Burrell was employed by the Exploration Company and was employed by them in the years 1901, 1902 and 1903. He was stationed at that time in Marysville, Montana. He was general manager of the Montana Company, Limited. This company was operating the property known as the Drumlummon. It embraced a great many mining claims there and was owned by the London Exploration Company. Mr. Alexander Burrell also managed the Edgemont properties at Edgemont, Nevada, for the London Exploration Company. I think he was interested in the management of the Jay Gould at one time while the company had a lease on it. The Jay Gould was located in Lewis and Clark County, Montana. Mr. Alexander Burrell was with the Montana Company, Limited, and the Exploration Company during the year 1901, 1902 and 1903. I knew Mr. Henry Burrell; became acquainted with him in
1888. He was then managing the San Cooley coal mines
124 near Great Falls Montana. These mines were owned by the Anaconda Company. The contract which I made with

Mr. Molson was signed by C. A. Molson as agent for the London Exploration Company, Limited, I also signed it. The terms of the contract were that I was to show them the coal lands in Delta and adjoining counties, in Colorado, and procure for them something over 1200 acres that Mr. Davis had an option on at that time. It was spoken of as the Davis Coal Lands. A banker in Delta owned the land and he had given a price of $12.50 an acre and that price was mentioned in the contract; and to locate and procure such other or as much other land as possible for them along the vein.

The lands that we were to locate belonged to the government of the United States at that time. Under my contract I was to personally receive ten per cent and Mr. Davis ten per cent; that is I was to receive twenty per cent. of which I was to divide half with Mr. Davis. The twenty per cent. was of the total amount paid for all lands obtained through location or purchase. (All evidence as to contents written contract objected to by defendants as [no] showing document lost, or that it could not be obtained, or foundation laid for secondary evidence.) Mr. Molson told me that the Exploration Company would handle the matter. (Objected by defendants, as hearsay, incompetent and irrelevant.) After I entered into this contract I went to Delta personally within a week. The contract which I made with Mr. Molson was entered into sometime after January 2, 1902, and before February 25th, 1902. Mr. Henry Burrell accompanied me to Delta at the request of C. A. Molson and on the orders of his brother Alexander Burrell. He went there to verify my statements to Mr. Molson. He was a coal expert. Henry Burrell said he was employed by the Exploration Company. (Objected to by defendants as hearsay, incompetent and irrelevant.) We remained at Delta two or three days. During that time we drove out to the coal properties and examined the outcrop and Mr. Burrell took some samples and we talked the matter over with Mr. Davis and secured
125 his consent to act in locating and obtaining the lands.

These lands were near Paonia on the North Fork of the Gunnison River. They were located on the north and west side of the river. I don't know anything about the transfer of the titles to these lands to Alexander Burrell. I didn't know anything about that matter until it was all over and Mr. Davis receiver his money. I never received the ten per cent. of the purchase price which had been promised me.

On Cross-Examination the Witness Testified as Follows:

I never talked with any officer of the Exploration Company with reference to its transactions in this country, out-

side of Mr. Molson. The reason that I know that Mr. Molson represented the Exploration Company is that I have received numerous communications from him on the stationery of the London Exploration Company and have talked over with him numerous prospects and mines which were to be examined for the Exploration Company. In this particular transaction I never had any letter from Mr. Molson or any other officer or agent of the Exploration Company indicating that Mr. Molson was representing the company in this transaction. All that I ever had was the contract that I had with Molson. This contract and ten years' connection off and on with the Exploration Company, with other officers and with Mr. Molson, is what I base my statement on that Mr. Molson was acting in this transaction for the company. I did not know of my own personal knowledge of any facts indicating Mr. Henry Burrell's connection with the Exploration Company in this transaction other than those that I have testified he told me. I knew Mr. Bayliss but have heard nothing from him during the last ten years. I never had any conversation or communication with any other officer of the Exploration Company with regard to this matter. When I first approached Mr.

126 Molson with reference to this property at Delta I told him that a part of it had been taken up and entries made. Mr. Molson employed me to acquire the land that had been taken up, and also to make entries of other lands which were to be found out by survey. I learned through Mr. Davis what lands were to be acquired. 1280 acres of land had already been entered upon and I represented to Mr. Molson that it was in shape to be presented to a third party. These lands which were to be taken up by the various entrymen were the ones that I referred to when I discussed the matter with Mr. Molson. As far as I personally know Mr. Alexander Burrell did not have anything to do with these lands. Mr. Molson told me that he would take the matter up with Burrell and if he was favorable his brother would come down, and when I met Mr. Henry Burrell he told me that Alec. had told him to come, and we discussed it and general transactions with the London Exploration Company and the Montana Company, Limited. The reason I was not paid the amount which I claim under my contract was because, I suppose, Mr. Alexander Burrell and Mr. C. A. Molson were skates and were trying to hog that portion of it themselves. I don't know whether they received any portion of it themselves. They never told me that such was the fact; it is merely my surmise from the way they acted. The contract was made with the London Exploration Company and not with Mr. Molson or with Mr. Alexander Burrell; it was signed C. A. Molson, Agent. They did not put the property in the name of the

London Exploration Co., but held it in the name of other people in order to try and befog me so that I would not know what to do with it, and after talking the matter over with Mr. Nye it was understood that Mr. Bayliss was to be here in the next year and I said "Well now we will wait until Mr. Bayliss comes here before starting suit and I am satisfied that when this is presented to Mr. Bayliss I can get a settlement with Mr. Bayliss without any suit." Mr. Nye left the city and I made a trip to Mexico and Mr. Bayliss did not
127 come. I had Mr. Davis look it up at Delta and at Montrose and he sent me the name of a Mr. Robinson that had it at that time. It was in his name. It was befogged and put in such shape that I couldn't attach the Exploration Company to it and I have been waiting ever since for an opportunity to sue the Exploration Company. I think all this was done to prevent me from receiving my compensation under this contract.

On Redirect Examination the witness testified as follows:

I first met Mr. Bayliss in January, 1885, at Marysville, Montana. He was general manager of the Montana Company, Limited at that time. At that time the London Exploration Company was not formed. He resigned as manager of the Montana Company about 1900, or 1901, and went to London and then the London Exploration Company was organized by a great part of the people who had been with him. And they went into the general buying of mining properties and Mr. Bayliss was made managing director of the Exploration Company and has continued as far as I know to this day. The way that I knew that an organization was perfected in London after Mr. Bayliss left this country was from reports in the mining papers from time to time. And from talks with Mr. Henry Bratnoner who was at first connected with them. Afterwards he and John Farrish formed another company in opposition to the London Exploration Company. I don't know anything of personal knowledge. Think the name of this company is the Exploration Company, Limited of London, but among mining men it is commonly called the London Exploration Company.

ALBERT L. SMITH testified for the plaintiff:

I reside in Helena, Montana, and am president of the National Bank of Montana. Am acquainted with Alexander Burrell and have known him for 25 years. At the time
128 that I first became acquainted with him he was manager of the Montana Company, Limited. Never knew of him

being employed by the Exploration Company, Limited. Knew Mr. C. A. Molson; met him about 1890. He was then employed by the Elkhorn Mining Company. Mr. Molson was also employed by the Exploration Company, Limited. For a number of years he represented them in looking for mining properties and looking after their interests in a general way. Was slightly acquainted with Mr. R. T. Bayliss. He lived in Helena, Montana, in 1889. Never had any business relations with him, nor with the Exploration Company, Limited. The Montana Company, Limited, had an account with my bank. Checks drawn on this account were signed by Alexander Burrell, General Manager. Am the Albert L. Smith to whom Alexander Burrell conveyed by warranty deeds, dated November 15, 1902, certain property in Delta County, Colorado. Do not know anything about the descriptions of the land. No consideration passed from me to Alexander Burrell for these conveyances. Don't know how the title to this land came to be conveyed to me by Burrell. The first thing that I learned about this matter was when Mr. Molson told me that he had had some property deeded to me in Colorado. Don't think I ever received the deeds myself. I didn't have these deeds recorded myself and didn't authorize any one to accept and receive the possession of these deeds for me. Don't recall when I deeded these lands away. No consideration was paid by Mr. Foster, or any other person or corporation, to me for making the deeds. Made the deeds at the request of Mr. Molson. Didn't know Mr. Foster and never had any communication with him looking to the transfer of the title to him. During the time that the title was in me I didn't advise any one of the fact. Never knew anything personally about the lands in question. Molson died some years ago.

129 On Cross-Examination the witness testified as follows:

Didn't act in this matter as a secret trustee for and on behalf of the Exploration Company, and I never at any time entered into any agreement or arrangement of any character whatsoever with the Exploration Company or any officer representing it, that I should act as such trustee. There was no agreement between me and the Exploration Company, or any officer or agent thereof, that I should permit the title to these lands to pass through me to Mr. Foster for the purpose of deceiving and defrauding the United States. When I executed the deeds for these lands to Mr. Foster there was no purpose or intent of effecting any fraudulent and unlawful scheme or conspiracy, nor for the purpose of concealing anything with reference to the transaction. Never agreed with the Exploration Company or Mr. Foster or any other person or persons

acting for or on behalf of the Exploration Company, Limited, that the true facts with reference to this transaction should be concealed from the government; nor have I refused at any time to tell all I knew concerning the facts connected with this matter. Have never attempted to obstruct, hinder and deceive the government of the United States in the ascertainment of the facts with reference to this transaction. Never knew that the Exploration Company or any officer or agent thereof had anything whatever to do with the matter. Mr. Molson had a great deal of personal business with me. This business involved property of various kinds in which he was personally interested. The entire transaction so far as I was concerned was similar to other business transactions that I had had for a number of years before and a number of years thereafter with Mr. Molson. It was merely an accommodation to Mr. Molson.

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130 CHARITY HIRD testified for the plaintiff:

I now reside in Los Angeles, California, but formerly lived at Delta, Colorado; I left there in 1903.

Certified copies of papers covering the filing of Charity Hird on the southeast quarter of section 27, township 13 south, range 91 west of the sixth principal meridian, were identified by the witness, marked plaintiff's Exhibit AAA and introduced in evidence. These papers consist of the coal declaratory statement, non-mineral affidavit, and power of attorney and are similar to those in Exhibit A in the testimony of witness Edyth Cartwright, sheets 3, 4, 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

Don't remember exactly how I came to execute these papers, but I remember Mr. Stephen Boyce came to the house and suggested to several of us that we take up the land; that there was a large syndicate that wished to get possession of it and that was the only way they could, by people taking certain parts of it and then selling it to them for $25; that is what we were to have for it. Don't know where Mr. Boyce is at the present time. I was paid $5 in cash by Mr. Boyce. Mr. Boyce told me the name of the syndicate but I don't remember what it was. Mr. Boyce told me to go before Millard Fairlamb, as a notary public, and execute the papers. At the time I executed the papers the room was full of people and there was another attorney there beside Fairlamb, but I can't think who it was. Boyce and his wife and her mother and John Davis, old Mr. Fairlamb, Mr. Gilbert and another

Mr. Davis that belonged to the company was there at the time. Was not acquainted with Henry Burrell but was with John Davis. Mr. Boyce and Mr. Fairlamb conducted the transaction. Didn't file the papers in the United States land office myself, nor pay any fees. The reason I made the filing was that they came and said the people wanted to have the land and there was $25 in it. I never had any intention my-
131 self of filing on coal land, nor any intention of perfecting the entry and paying the government the purchase price. Made out a deed in Mr. Fairlamb's office. It ran to this coal company that the Davises were connected with but I couldn't tell you the name. Mr. Boyce told me the reason that I was paid $5 instead of $25 was that the land was not worth anything and wasn't accepted; that there was no coal vein in it. The deed which I made was to the coal company and not to any individual, I am sure.

On Cross-Examination the Witness Testified as Follows:

Signed this quit claim to the land the same day I signed the papers—it was all done the same day; executed the deed before Millard Fairlamb. Never at any time refused to tell all I knew about the facts connected with this entry to any officer of agent of the United States government. Never entered into any agreement with any person or persons that I would conceal from the government or any of its officers or agents the true facts with reference to this entry. Have talked with the agents and officers of the United States government concerning this entry and have freely told them all I knew about the matter.

On Re-direct Examination the Witness Testified as follows:

The first time an agent of the government questioned me about this transaction was about ten days ago. Talked with United States Commissioner Welch in Delta, Colorado, about this matter, told him I had made this coal declaratory statement. This conversation was prior to my coming here (Los Angeles). This occurred between eleven and twelve years ago.

DANIEL S. DOUGHTY testified for the plaintiff:

I now reside in Los Angeles but lived in Delta, Colorado, from 1895 to 1912. Was at one time county clerk of Delta County, Colorado, and served four years.

Certified copies of papers covering the filing of Daniel S. Doughty on northeast quarter of section 16, township
132 13 south, range 91 west, sixth principal meridian, were identified by the witness marked Plaintiff's Exhibit

BBB and introduced in evidence. The papers contained in this exhibit consist of the coal declaratory statement, non-mineral affidavit, and power of attorney and are similar to those in Exhibit A in the testimony of witness Edyth Cartwright, sheets 3, 4, 5, Henry Burrell acting as attorney in fact. Papers filed March 17, 1902.

Heard about their paying $25 for relinquishments. Couldn't say whom I heard it from. Anyway, Mr. Fairlamb made out the papers. Was told that I could sell the relinquishment for $25, right away, by Mr. Fairlamb. Sold the relinquishment for 20 or $25. I have forgotten which. Mr. Fairlamb paid me the money in gold. Heard about the matter before I talked with Mr. Fairlamb. There were so many at that time that I don't recall with whom I talked. At the time I made out those papers my purpose was to sell for $25. Did not intend to carry the entry to patent or to pay the government the purchase price for the land. Signed the papers necessary to convey the land but could not say I signed the relinquishment at that time or not—it has been a long time ago. The papers were executed in Mr. Fairlamb's office in Delta, Colorado. I never paid any fees for filing these papers.

On Cross-Examination The Witness Testified As Follows:

Just lately, ten days ago, I suppose, something like that, an agent was out here and questioned me and I didn't tell him all I knew. The only reason that I didn't tell him all I knew was because I didn't want to be subpoenaed as a witness to go to Colorado or anywhere else if I could help it. Did have a conversation with an officer or agent of the government seven or eight years ago about the matter. Didn't tell him all I knew for the same reason—I didn't want to be dragged into the case as a witness. I never entered into any
133 agreement with any one to keep the facts in this transaction from the government. I was the only one that had anything to do with this transaction as far as I know. Had just heard about the others.

ALEXANDER BURRELL testified for the plaintiff:

I now reside in Choteau, Montana, but am temporarily living in St. Paul, Minnesota. I have been engaged in the mining business for 40 years or more. I was connected at one time with the management of the Drumlummon mine. This mine was owned by the Montana Company, Limited, afterwards changed under reorganization to the Montana Mining Company, Limited. I occupied the position of mine superintendent and was later advanced to general manager. I

went to work for the Montana Company, Limited, in 1888; was employed by the then general manager, R. T. Bayliss. Mr. Bayliss remained in this country up until 1897, when he left the United States. After Mr. Bayliss left this country he became chief of the mining department and then managing director of the Exploration Company, Limited.

134 Obtained this information on visits which I made to the London office. There was no connection whatever between the Montana Mining Company, Limited, and the Exploration Company, Limited. He visited this country several times after he became associated with the Exploration Company, Limited. The last time he was here was a year ago last February. Continued to work at the Drumlummon for the Montana Mining Company, Limited, up until 1911. The Exploration Company, Limited, never had anything to do with the Drumlummon mine. After I left the Drumlummon I took charge of the plants of the Montana Mining Company, Limited, in the United States. Was never employed by the Exploration Company, Limited, except upon one occasion; that was two or three days when I was looking up property for them in Montana. Was employed by Mr. Bayliss. Was employed to go to a certain property, make an examination and report by cable. It took, me two or three days. Have been in Delta County, Colorado, but am not acquainted with John Davis. I am the brother of the late Henry Burrell. Did not have anything to do with acquiring title to public lands in Colorado at any time. Am the same Alexander Burrell to whom title to certain property in Delta and Gunnison counties, Colorado, was conveyed by various persons. This property embraces the land involved in this suit. Did not pay any money to the respective grantors in these deeds to me. Did not deal directly with the grantors. The arrangements which culminated in the conveyance of the various titles to me were made by my brother, Henry Burrell. The first time I knew that the titles to these lands had been put in my name was when the deeds were sent to me. Conveyed these lands to Albert L. Smith at Helena Montana. He paid me nothing for the conveyance, nor did any one else. Was to receive an interest in this property. This interest was promised to me by Mr. Molson. Mr. Molson was a friend who resided

135 in Montana for many years and conceived the idea of going into the coal business. M. Molson was employed by the Montana Company, Limited, the Montana Mining Compay, Limited, and the Exploration Company, Limited, at times. Mr. Molson is now dead. Mr. Molson was employed as consulting engineer by the Exploration Comapny for its various interests in the United States and Mexico. The

duties of a consulting engineer are to visit properties that are being operated by the company, to assist the management in every way possible and to make suggestions and report conditions as he finds them, and also to ascertain new properties and make reports on his own initiative to the home office. Never knew Mr. Molson examined any mining property that was afterwards acquired by the Exploration Company, Limited. Made one visit to the lands involved in this suit. Went there with my brother to look up the advisability of starting a mercantile coal business on the property. Am acquainted with Philip L. Foster; have known him a good many years. Knew of his employment by the Exploration Company, Limited. It was after the title to these lands was placed in my name. The circumstances under which I came to deed the lands to Mr. Smith were that I was about to go to Old Mexico to look up the advisability of accepting a position there, and it was considered a good thing to have the deeds transferred to Mr. Smith as a matter of convenience. Am not sure, but I think Mr. Molson suggested this to me. The title to these lands was originally placed in my name as the result of a meeting between Mr. Molson, my brother Henry, and myself. Don't know who directed Mr. Smith to convey the lands to Mr. Foster. Had nothing whatever to do with the making of the various entries to these lands. Did not directly pay the United States government any money for the lands. Never advised or consulted with any of the persons in regard to making their several entries. Was promised an
136 interest in these lands at a meeting held in Helena, Montana, between Mr. Molson, my brother and myself. At this meeting an arrangement was made by which we were to acquire some coal land for ourselves. The interest which I was to receive was not specified at that time. I gave my brother $1800 on account of his time and expenses in connection with the proposed acquisition of such property. Do not know what Molson put into this combination. The payment to my brother was somewhat in the nature of a grubstake. Mr. Foster acts as consulting engineer and as agent in the United States for the Exploration Company, Limited. He never represented at any time the Montana Mining Company, Limited or the Montana Company, Limited.

Cross-Examination

This conference between Mr. Molson, my brother Henry and myself took place in Helena, Montana. Don't remember the exact date. It was agreed that my brother should endeavor to select some property for us. He was to go out and find or acquire a coal property and develop the same at the expense

of the parties to the agreement, except the interest I was to receive was to be nonassessable. There was no other company or person interested in this arrangement other than those I have named. My brother Henry acquired lands in Delta and Gunnison counties, Colorado. At this time the Exploration Company, Limited, had no connection whatever, or interest in these properties or in this arrangement. These properties were acquired by Mr. Molson, Mr Bayliss, my brother Henry and myself as a personal investment of our own. Neither the Exporation Company nor any other corporation had any interest in the matter. The only connection that I had with these properties was to receive the title and later to transfer the same
137 to Mr. Smith. Mr. Molson and Henry Burrell had charge of the acquiring of the property and handling of it. All the details with reference to that were left to them. I have an interest in the property today; own one-half of my brother's one-fourth. The Exploration Company never at any time owned or had any connection with the Montana Company. Limited, or the Montana Mining Company, Limited. Never was employed by the Exploration Company at any time except on the one occasion to which I have referred, when I made an examination of certain property for them, which took about two or three days. My brother, Henry Burrell, was never in the employ of the Exploration Company. That company never owned, operated or developed the Drumlummon mine or had anything to do with it. The Exploration Company never owned or operated the Edgemont properties at Edgemont, Montana. The Exploration Company was never interested in the management of the Jay Gould mine, nor did they have a lease on it or operate it at any time. Was acquainted with the Sand Coulee (called San Cooley by the witness Donohue) mine, near Great Falls, Montana. That mine was operated by the San Coulee Coal Company, a subsidiary of the Great Northern Railway Company. The Anaconda Mining Company never owned or operated this mine. The Exploration Company, Limited, never had anything to do with the employment of my brother Henry in securing the coal properties which are now the subject of this suit. At the time the arrangements were made between Mr. Molson, my brother Henry and myself to acquire the properties involved in this suit there was no agreement of any kind between ourselves and the Exploration Company or Mr. Foster, nor did we conceal any of the facts with reference to the transaction. The parties to the agreement were acting in their individual capacities alone, and not as agents for or in behalf of the Exploration Company or Mr. Foster. Neither the Exploration Company nor Mr. Fos-

ter had any interest in these properties at the time they
138 were acquired, nor was there any agreement that the properties were to be transferred or conveyed to the Exploration Company. I have never refused at any time to state all the facts with reference to this transaction, and whenever I have been requested by the government or any of its officials, have freely given them all the information which I had. Never at any time acted as a secret trustee in this matter for and on behalf of the Exploration Company, Limited, and never at any time sought to, deceive or defraud the government.

Redirect Examination.

The meeting which I have referred to, held at Helena, Montana, was between Mr. Molson, my brother and myself. Mr. Bayliss was not present but he was a party to the agreement, through the representation of Mr. Molson, who acted as his agent in the matter. Mr. Bayliss was in London at that time. Never had any personal conversation with Mr. Bayliss in regard to this syndicate. At this time Mr. Bayliss was chief of the mining department of the Exploration Company. At the time this syndicate was formed at the meeting in Helena, we did not have the acquisition of any particular lands in mind. We were to acquire coal lands. The laws of the United States with respect to the acquisition of title to public lands were not discussed at that meeting nor at any other meeting between us. It was left entirely to my brother as to what lands should be acquired. The interest which I have in these lands arises by virtue of a promise which was made by those present and represented at the meeting in Helena, Montana. The interest was not specified at that time. My brother and myself now hold a one-fourth interest, the other three-fourths. My interest in these lands has been recognized in a personal letter written to me by Mr.
139 Bayliss. The letter states that the title to the Coloroado coal lands is in the name of Philip L. Foster and they recognized a one-fourth interest in the operation or disposition of the lands in my brother and myself. That letter came from Mr. Bayliss personally. When I say they recognized our interest, I mean the parties to the syndicate. This letter was received in 1906 [ot] 1907. These coal lands in Colorado are the only lands which the syndicate acquired.

PHILIP L. FOSTER testified for the plaintiff:

I reside at 12 West 44th Street, New York City. Am a mining engineer. Am familiar with the Exploration Company, Limited; have known of them for 26 years. Their

principal office is at 11 Cornhill, London, England. The company has owned properties in the United States but never operated them. Am employed by the company as mining engineer. My duties are to advise them with regard to the purchase of properties, of securities, and advise them as to the management of companies which they have promoted and managed. Transact business for the Exploration Company, Limited, under a power of attorney, which was duly signed and sealed by the Exploration Company, Limited, and duly authenticated.

The power of attorney was produced and introduced in evidence. This power of attorney is dated September 23rd, 1904, and the material parts are as follows, to-wit:

"Now Know Ye And These Presents Witness that the Company doth hereby nominate constitute and appoint the said Philip Lawrence Foster as the Attorney and Representative of the Company in the United States of America and in Mexico and Canada to represent and act for the Company in all matters without any limitation or exception whatsoever and to do in regard thereto. All that the Company acting by its Board of Directors could do and as fully and effectually
140 to all intents and purposes as if every act or thing done by the Attorney was a thing done by and under the authority of the Board of Directors of the Company and in particular* * * * * * *"

Was employed by the Exploration Company prior to September 23, 1904, as consulting engineer to various subsidiary companies in New Zealand and Mexico. Was also employed by the Anaconda Mining Company. This was independent of my employment by the Exploration Company. Upon receipt of the power of attorney dated September 23rd, 1904, I opened offices here in New York City to put me in closer touch, with the properties in which the company held investments, many of which are located on this continent. It was found that too much time was wasted in crossing the ocean as I had to make many trips. Another reason for opening this office was that I should be able to report on properties that were brought to my notice as
141 investments that would be suggested from this country and to advise them generally on such investments. I examine properties without definite instructions and make my [recommensations] without definite request. Am not personally familiar with the lands involved in this suit. Am acquainted with Alexander Burrell; have known him 20 years I think. He never was employed by the Exploration Company to my knowledge. I was acquainted with Charles A.

Molson during his lifetime. He was employed by the Exploration Company from about 1897 to the time of his death. He maintained an office in Salt Lake City for the Exploration Company, Limited. He established this office about 1900. Mr. Molson was employed as consulting engineer. His duties were to secure investments in mining properties in this country. His duties were more or less similar to mine but my power is perhaps broader. Have never acted for the Exploration Company in any capacity without first submitting my report to the Board. I first submit any option that may be obtained by me so that they may learn the terms of the business, and I never act until such report has been passed on by the Board. My report to the Board deals solely with the physical conditions and prospects. When I take an option it is in my own name as attorney for the Exploration Company, provided it is to the Exploration Company the option will eventually run. There was never any relation whatever between the Montana Company, Limited, or its successor, the Montana Mining Company, Limited, and the Exploration Company, Limited. The only subsidiary company of the Exploration Company in the United States is the Tomboy Gold Mines Company, Limited. The Drumlummon has no connection whatever with the Exploration Company, Limited. Am acquainted with Mr. R. T. Bayliss; have known him for 26 years. He never was located in this country as the representative of the Exploration Company. In 1901 he was
142 mining adviser to the Exploration Company. He then became managing director, subsequently and still is chairman of the Exploration Company. In 1901 he was mining adviser, and in 1902 or '3 he became a managing director. Mr. Molson's duties were somewhat similar to mine. All payments for salaries, commissions, and all other matters made by the Exploration Company, are handled directly through the London office. None of their accounts are handled in this country. I am the Philip L. Foster named as defendant in this action, and hold the legal title to the lands involved. I paid no consideration to Mr. Smith for the conveyance of the title to these several tracts of land to me, nor did I pay anything whatever to any one else. No money or other valuable consideration passed through my hands as a consideration for this conveyance. I had nothing to do with the transaction by which the transfer was made to me. I received the deeds about the end of 1904. They had already been recorded in Delta and Gunnison counties, Colorado. I do not know who placed them on record nor who paid the fees therefor. The titles to these several tracts of land were placed in my name as the representative in this country of the Exploration Company so that I would be enabled to deal

with them should it be necessary to act. The sole reason was to expedite matters, such as the disposition of the lands to other companies or possibly to subsidiary companies of the Exploration Company. At a conference which took place in London prior to my leaving for New York to take up my residence here, Mr. Bayliss told me that coal lands in Colorado in which the company was interested would be transferred into my name. This conference occurred about the end of 1904. I did not have anything whatever to do with the transaction by which the Exploration Company acquired its interest in these lands. Never had any conversation with Mr. Molson in regard to acquiring these lands, nor with
143 Alexander Burrell or Albert L. Smith. After this suit was started I had a conversation with Alexander Burrell. My conversation with Alexander Burrell was with reference to his brother's interest in the coal lands.

On Cross-Examination the witness testified as follows:

Mr. Molson was engaged in private enterprises at the time of his connection with the Exploration Company. Some of these private enterprises the Exploration Company subsequently became interested in. At the time Mr. Molson took them up as a private matter the Exploration Company had no interest in them whatsoever. After I acquired the legal title to the lands in suit I have on various occasions discussed with others the fact that I hold these properties for the Exploration Company. I talked with W. T. Thornton who is connected with the International Smelting and Refining Company, and to Daniel Guggenheim. I hope to sell the lands. Never at any time sought to conceal the fact that I hold these properties as trustee for the Exploration Company. On the contrary, I informed any person I thought would be likely to purchase them that such was the fact Have never sought at any time to conceal from the United States government, or any of its officers or agents, the facts within my knowledge relative to the acquisition of these lands by myself as trustee for the Exploration Company. I have executed no document or instrument in writing declaring and expressing the beneficial interest of the Exploration Company in these lands for the purpose of deceiving and defrauding the United States government. The only document that I have ever executed with reference to these lands is the yearly letter to the Exploration Company, in which I acknowledge that I hold these lands on their account, which letter is submitted to the public accountants and incorporated in the annual report.
144 On Redirect Examination the witness testified as follows:

The public accountants that I refer to are located in the City of London, England. I had an interview with Mr. M. D. McEniry. This occurred sometime in the spring of 1909. He questioned me in regard to my interest and the interest of the Exploration Company in these lands. I told him then in substance what I have told today. Verbally I was informed in London that Henry Burrell had an interest in these lands. Have visited Molson in Salt Lake City. My recollection is that the sign "The Exploration Company, Limited", was on the door, beneath which was "C. A. Molson, Mining Engineer".

FRANK J. BERGIN testified for the plaintiff:

I am a clerk in the General Land Office, Washington, D. C. Am familiar with the records kept in this office. Have examined the records in this office with reference to the entries for the lands involved in this suit.

The records were produced and identified by the witness, and certified copies of the originals introduced in evidence as Exhibits A, B, C, D, E, F, G and H.

Exhibit A is a letter dated October 20, 1908, addressed to the Secretary of the Interior and signed by Charles J. Bonaparte, Attorney General; enclosing copy of letter from E. H. Long, special assistant to the Attorney General; referring to apparent coal land frauds in Gunnison and Delta Counties, Colorado, which have resulted in the Utah Fuel Company and the Juanita Coal & Coke Company acquiring coal lands. The Interior Department is advised that Mr. Long has been instructed to report to United States Attorney Ward and to assist in an investigation of the facts and the preparation of necessary papers to maintain suits to set aside these patents, which it is proposed to have brought before the running of the statute of limitations on December 9 and 13, 1908.

Plaintiff's Exhibit B is a copy of a letter dated Octo-
145 ber 19, 1908, addressed to the Attorney General and signed by Eugene H. Long, special assistant to the Attorney General. The letter is as follows:

"While engaged in investigating cases of land fraud in Colorado, and especially those in connection with the Utah Fuel Company, I recently discovered that the said company had extended its land purchases into Gunnison and Delta Counties. Well knowing the method of work of Mr. Robert Forrester, whose name appears in connection with the work in which I was engaged at the time of the discovery, I went

to Gunnison and Delta Counties and examined the land entries that had been made there in the interests of the Fuel Company. I have not investigated them sufficiently to state the extent of the fraud, nor have I obtained sufficient information to enable me to prove that fraud has been connected with them, yet the finger marks of fraud are so plain that I am satified that it is a continuation of the methods employed by Mr. Forrester in obtaining land which ultimately passed into the possession of the Utah Fuel Company.

I enclose herewith a list of the entries in Gunnison County, comprising 2400 acres, and an abstract of said lands showing the method by which and the time at which they passed into the hands of the Utah Fuel Company. As the statute of limitation will begin to run on all of them early in the month of December, if it be found desirable to take steps to recover the land, quick action must be had.

In the course of my examination of the records of Delta county I discovered a similar state of affairs to that above outlined in existence there, involving 24 entries and 2880 acres of land, which land had been deeded by the various entrymen to the Juniata Coal & Coke Company, a corporation existing under the laws of the State of Colorado, whose main office is at Pueblo, Colorado. As the statute of limitations in these entries, a list of which is enclosed herewith, will begin to run on the 9th of December, prompt action will also have
146 to be had here.

From my past experience in examining land fraud cases in Colorado, I do not hesitate to stamp the transactions in the counties above referred to as fraudulent and deem it my duty to report the facts to the Department for such action as it may deem appropriate."

Plaintiff's Exhibit C is a letter dated October 21, 1908, addressed to the Attorney General and signed by Frank Pierce, Acting Secretary of the Interior. This letter acknowledges receipt by the Department of the Interior of Plaintiff's Exhibit A, with the Long report enclosed, and advises that the Commissioner of the General Land Office has forwarded to the chief of the Field Division all data concerning these coal entries which could be collected in the General Land Office, for further investigation, and offers the co-operation of the Interior Department in the preparation of evidence necessary for suits.

Plaintiff's Exhibit D consists of a list of cases which will expire under the statute of limitations in December, 1908, and covers numerous entries, title to which ultimately vested in the

Juanita Coal & Coke Company. Then follows a list of cases which will expire under the statute of limitations December 1, 1908, consisting of entries the title to which ultimately went to Robert Forrester et al.; the foregoing list of property being the abstracts of the various tracts of land referred to by E. H. Long, special assistant to the Attorney General, in his letter, Plaintiff's Exhibit A. Exhibit D does not embrance any of the lands in suit.

Plaintiff's Exhibit E is a copy of a letter dated Denver, Colorado, January 25, 1909, addressed to the Commissioner of the General Land Office, Washington, D. C. and signed by Ralph D. Kelley and James H. Anderson, special agents of the General Land Office. This letter is a report referring to an investigation made of a list of 134 entries of lands in township 13 south, ranges 90 and 91 west, Gunnison and
147 Montrose land district. Of these 134 entries, 65 are coal cash entries which are made the subject of separate reports, and the remaining 69 cases are agricultural entries. These 65 entries are found to be without fraud and the report recommends that no further investigation be made. Exhibit E does not embrace any of the lands in suit.

Plaintiff's Exhibit F is a letter dated Denver, Colorado, April 17, 1909, addressed to the Commissioner of the General Land Office, Washington, D. C., and signed by M. D. McEniry, chief of Field Division, enclosing copy of adverse letter report on an alleged conspiracy by which the government was defrauded out of 1120 acres of valuable coal land in Colorado by agents of the Exploration Company, Limited, of London, England, and was received in the General Land Office on April 20, 1909. The report shows that the lands in question (being the lands involved in this suit) are contiguous to the entries made in the interest of the Juanita Coal & Coke Company and the Utah Fuel Company, which were made about the same time, in the same townships. The report indicates that the entries were made by nine entrymen in May, 1902, under the direction of Millard Fairlamb, of Delta, Colorado, acting as a legal representative of the Exploration Company, Limited. Patents on these entries were issued in the fall of 1902, and it would seem that the statute of limitations is a bar to the commencement of suits to set aside these patents, unless the fact that these entries were made for foreigners who have no legal rights to procure land from the government can be set up as a bar to the running of the statute.

The report of the special agents, Kelley and Anderson, transmitted with the McEniry letter, is dated Denver, Colorado, April 12, 1909, addressed to the Commissioner of the

General Land Office, Washington, D. C., and signed by Ralph S. Kelley and James H. Anderson. This report shows that the investigation made by these agents was in conformity with the following direction:

148 "Secretary Garfield directs that you investigate as to all the lands in these townships regardless of the running of the statute and that, if it is ascertained that the coal companies are now in possession of any lands fraudulently acquired, a demand will be made upon them to reconvey the same, notwithstanding patent may be more than six years old."

This instruction was contained in letter dater October 24, 1908, referring to entries in township 13 south, ranges 90 and 91 west, Montrose series. Then follows a detailed report as to the various entries made and the investigation made by the special agents, including interviews with the various entrymen and other persons having knowledge of the transaction. The report also contains the result of an examination by the special agents into the nature and character of the Exploration Company, Limited, including copies of reports by the directors of that company to the shareholders, a list of the directors, notice of meetings of shareholders, reports of the accountants of that company showing the balance sheet and profit and loss account, submitted to the shareholders and a list of the officers and directors.

Plaintiff's Exhibit G is a copy of a letter dated October 20, 1909, addressed to the Attorney General and signed by Frank Pierce as Assistant Secretary of the Interior. This letter refers to the report of the special agents, Kelley and Anderson (Plaintiff's Exhibit F). After referring in detail to the various matters contained in this report, the First Assistant Secretary refers to the fact that the six years have elapsed since these patents were issued, and calls the attention of the Department of Justice to certain memorandum prepared by Mr. Henry Lewis of that Department, wherein he considers the question of instituting suits to annul patents in cases where the lands are still owned by the perpetrat-
149 ors of the fraud, although more than six years have elapsed since the date of the patent, and the case is referred to the Department of Justice for action.

Plaintiff's Exhibit H is a copy of a letter dated Washington, D. C., October 24, 1908, addressed to M. D. McEniry, chief of Field Division, Denver, Colorado, signed by H. H. Schwartz, chief of Field Service. This letter calls attention to certain coal entries brought to the attention of the De-

partment of Justice by special assistants to the United States Attorney, with a recommendation for investigation, and directs that two competent agents be assigned for this purpose. These are the entries referred to in previous exhibits introduced by the government in connection with the testimony of the witness Bergin, and refer to the entries of the Juanita Coal & Coke Company and the Utah Fuel Company. Then follows the direction issued by Secretary Garfield for an investigation of all the entries made in these townships, regardless of the running of the statute of limitations.

The originals of these papers are part of the records of the General Land Office of the United States. The first communication was received in the office of the Secretary of the Interior October 21, 1908. I have searched the records of the General Land Office and have ascertained therefrom that no information was received in that office in regard to any of the lands involved in this suit between October 21, 1908, the date of plaintiff's Exhibit A, and the 25th day of January, 1909 The original of the letter dated January 25, 1909, (Plaintiff's Exhibit E) was received by the General Land Office January 30, 1909. The letter dated April 17, 1909, (Plaintiff's Exhibit F) was received by the General Land Office April 20, 1909. I have examined the records of the Department of the Interior, and these records show the initiation of the entry papers and the steps of procedure which
150 followed from that up until the time they were effected by entry. This particular report dated April, 1909, by special agents Kelley and Anderson had to do with these entries after they had passed to patent. I searched the records of the General Land Office and am in a position to state that prior to the receipt of the aforesaid report of special agents Kelley and Anderson no information or complaint was received which would affect the validity of the entries therein described. I find that the first information—the first complaint—in regard to the entries described was contained in the agents' report of April 17, 1909, submitted by special agents Kelley and Anderson (Plaintiff's Exhibit F). I was a clerk in the Department at the time of the receipt of the letter dated October 20, 1908 (Plaintiff's Exhibit A) and have remained constantly as an employee of the Department up to the present time. I did not receive any information of the acquisition by the defendants, the Exploration Company, Limited, or Philip L. Foster, of title to the lands in question until receipt of the special agents' report dated April, 1909. From an investigation which I have made of the records of the Interior Department I can say that no such information was received by the Department prior to April 17, 1909, the

date of the report. Upon the receipt of this report the same was submitted to the Attorney General, or the Department of Justice, with the recommendation that suits be brought. The records of the Department of the Interior disclose no information whatever conveyed to the Department of Justice in regard to the Exploration Company, Limited, prior to the date of the letter of October 20, 1909. From my knowledge of the methods of conducting the affairs of the Department of the Interior I can say that that Department, prior to April 17, 1909, had no information or knowledge that the title
152 to the lands in controversy had been fraudulently acquired by the defendants, the Exploration Company, Limited, or Philip L. Foster.

On Cross-Examination, the witness testified as follows:

I am at present engaged as a clerk in the Field Service Division of the General Land Office. I am not the only employee in the department that is engaged in this class of work, and am not personally familiar with all the matters that pass through the department—only those that happen to be turned over to me for personal attention are those with which I become personally acquainted. The card index system to which I have referred does not contain a record or memorandum of every action or complaint that may be received by the department. I might say generally that information might be received by the department referring to the nature and character of a certain entry and if in the opinion of the particular official to whom this information was directed it was not a case for further investigation there would be no record made of the fact that such information was received, upon the card index system or upon any other record of the department. The testimony which I have given as to information acquired by the department concerning the particular transactions involved in this suit is based exclusively upon an examination of the card index. It would not be possible for me to testify personally that the department has not at any time prior to the report of April 17, 1909, received information as to the nature and character of these particular entries. My testimony is based merely on the fact that an examination of these particular records fails to show any matters of record. The records of the office would disclose any correspondence in regard to these particular entries. From my examination I find no such correspondence has been received and I
153 testify to a fact which negatively is a matter of record. My investigation amounted to this: I examined the card index, and the file of papers attached to the original entry covering the acquisition of these tracts of land.

On Redirect Examination, the witness testified as follows:

Mr. H. H. Schwartz, at that time the chief of the Field Service Division, directed me to make this search about which I have testified:

GEORGE F. MIKKELSON testified for the plaintiff:

I am a clerk in the Department of Justice and have been such for ten or eleven years. I am now in charge of the mail and files division and as such have custody of the files and records. I do not have custody of all the files of the Department of Justice. The Attorney General and Bonding Clerk maintain separate files; the Bureau of Investigation maintains a separate file; the Assistant Attorney General in charge of suits against the United States in the Court of Claims and in the District Courts maintains a separate file; the Division of Accounts maintains a separate file of certain minor matters pertaining to accounts. I have custody of all the files relating to suits to cancel patents to public lands. Upon the receipt of the communication from the Secretary of the Interior requesting suit for the cancellation of land patents such communication is first assigned to the officer who has charge of the conduct of such suit in the department; after which a record in the Files Division is made and the communication is then transmitted to that officer. Communications, with rare exceptions, are recorded the same day they are received. File No. 148747 has to do with the case of the Exploration Company, Limited, known in this Division as the coal land fraud case in Colorado. I have examined
154 this file. The first communication received by this department from the Secretary of the Interior upon this subject was of date October 20, 1909, recorded in this division October 21, 1909. I have examined the index for the purpose of ascertaining whether there was any correspondence with regard to this suit or its institution, or matters involved therein, prior to the letter of October 20, 1909, and do not find any. My view is that the letter of October 20, 1909, is the first communication received in this department upon the subject. The second paper in this file is what is known as a jacket, being a part of the records of the communication received from the Secretary of the Interior under date of October 20, 1909, briefed from the Secretary of the Interior, subject, request investigation with view to action against the Exploration Company, Limited, coal land frauds, Colorado, referred to Knaebel, action filed, initialed "E. K.", being the initials of Mr. Knaebel, notation in pencil, "Papers

of this jacket taken for perusal by Mr. B. D. Townsend May 13-10." Initialed "E. K." and marked "File H. C. L." being the initials of Henry C. Lewis, an attorney in the office of Mr. Knaebel.

(Witness then testified to further records made subsequent to October 21, 1909).

I have examined the index and file of our records to determine whether or not there was any communication on this subject received prior to the letter of October 20, 1909, and I find there was not. My statement that no such communication was received by this department is based merely on an examination which I have made of the records to which I have already referred. I am not familiar with nor have I made an examination of all the records of the department. The only records that I have examined are those specifically referred to by me.

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155 RAWLINSON T. BAYLISS testified for plaintiff:

I reside in London where I was born. Am chairman of The Exploration Company, Limited. Joined this company as its mining advisor in 1897. Became its managing director about 18 months later and chairman of the company about 1901 or 1902.

Identified plaintiff's Exhibit A as copies of the records of this company relating to the various appointments as director, managing director, and other official positions of the witness with the Exploration Company, Limited. These papers were marked Plaintiff's Exhibit A and introduced in evidence. This exhibit shows that on April 28, 1898 occurred the resignation of the witness as mining advisor of the company and the cancellation of his appointment as such dated April 9, 1897; that he was on said April 28, 1898, appointed an additional director of the company and member of the executive committee, and constituted managing director to attend to the ordinary conduct and management of the business of the company, subject in all cases to the will of the Executive Committee; that his remnueration as such managing director was fixed at the rate of 2,000 pounds per annum, together with a certain percentage of the profits of the company; that the witness was, under date of April 28, 1898, advised in writing of his appointment by such resolution, and that on the same date he accepted such appointment in writing; that on March 20, 1901, by resolution of the directors of such company, the percentage of participation of the witness in the net profits of the company was modified; that on November 19, 1901, by resolution

of the Board of Directors of this Company, the appointment of the Executive Committee was rescinded and that until further order, there be no Executive Committee of the
156 Company, that the remuneration of the witness as managing director of the Company be as from the first day of Secember, 1901, fixed at the date of 2500 pounds per annum, together with certain participation by way of commission in the net profits of the company, and witness was elected chairman of the Board of Directors. By resolution on the date of March 24, 1904, the Board of Directors appointed witness and James Henry, Montague Shaw managing directors "upon the same terms in all respects as those upon which they were until the 21st inst. managing directors of the old company," and that such appointments in the present company were to date from the same day and being accepted by them respectively in substitution for the old appointments, and to include their discharging without any further charge in respect thereof the duties of liquidators of the old company, and the terms as to remuneration and otherwise being, as regards Mr. R. T. Bayliss, those embodied in the resolution of the Board of the old company in regard thereto dated the 28th April, 1898, as modified by the two subsequent resolutions thereon dated respectively the 20th March and the 19th November, 1901, and, as regards Mr. James Henry Montague Shaw those embodied in the resolution of the Board of the old company dated 4th November, 1902, except that the commission of 1% payable to Mr. Shaw under the last mentioned resolution is in lieu of the same being on the amount of all divi-ends paid by the company to its shareholders, to be 1% of the net profits (if any) of the company made in each year, the terms of the foregoing appointments to be embodied in a further resolution to be prepared by the company's solicitors for entry on the minutes of the next Board meeting; that on March 29, 1904, by resolution of the Board, said proceedings of March 24, 1904, were adopted and set out in detail; that witness was in writing on March 29, 1904, advised of this
157 resolution and on April 13, 1904, in writing accepted such appointment under said resolution.

The date of my appointment as chairman is shown in Exhibit A and was some time in 1901. The duties of a chairman of a joint stock company such as The Exploration Company are to preside at meetings of the directors and at the ordinary general meetings of the shareholders. Beyond that fact the chairman of a joint stock company has no further powers than an ordinary director.

Witness identifies a certain pamphlet as a correct copy of the memorandum and articles of association of The Explora-

tion Company, Limited, which was incorporated on the 19th day of June, 1896, which was marked Plaintiff's Exhibit B and introduced in evidence. Exhibit B shows that the object of this company, among others, is to purchase or otherwise acquire, and to sell, dispose of and deal with mines and mining rights and property supposed to contain minerals or precious stones of all kinds; and undertakings connected therewith, and to purchase or otherwise acquire, sell, dispose of and deal in real and personal property of all kinds, the capital of the company being 1,250,000 pounds, divided into 1,250,000 shares of one pound each, and provides for the appointment by the directors of a managing director and to entrust to and confer upon such managing director "for the time being such of the powers exercisable under these presents by the directors as they may think fit * * * ". The directors are also authorized to provide "for the management and transaction of the affairs of the company at home or abroad in such manner as they think fit * * * " and specifically provides that "the directors may at any time, by power of attorney under seal, appoint any person or persons to be the attorney or attorneys of the company for such purposes and with such powers, authorities and discretion (not exceeding those
158 vested in or exercisable by the directors under these presents) and for such periods and subject to such conditions as the directors may from time to time think fit * * * ".

Witness identified a certain pamphlet as a correct copy of the memorandum and articles of association of The Exploration Company, Limited, which was incorporated on the 21st day of March, 1904, which was marked Plaintiff's Exhibit C, and introduced in evidence. (The introduction in evidence of this exhibit was objected to by the defendants on the ground that it appears that the exhibit offered is the articles of association of the Exploration Company, Limited, incorporated March 21, 1904, and this company is not a party defendant to this suit and therefore the articles of association of that company are immaterial, irrelevant and unnecessary to any issue in this case). This exhibit C shows that the capital stock of the company is 750,000 pounds, divided into 750,000 shares at one pound each. In a preliminary statement this memorandum provides that "the marginal notes hereto shall not affect the construction hereof and in these presents unless there be something in the subject or context inconsistent therewith—"

" 'The company' or 'this company' means the above named company (incorporated in 1904).

"'The old company' means the Exploration Company, Limited, (incorporated in 1896) * * *"

One of the objects of the company as set forth is

"To acquire and take over as a going concern the undertaking and business of The Exploration Company, Limited (incorporated in 1896), or any part thereof, and all or any of the assets and liabilities of that Company, and with a view thereto to adopt and carry into effect with or without modification the Agreement referred to in Clause 3 of the accompanying Articles of Association."

Said clause 3 of the company's Articles of Association being as follows, to-wit:

"3. The Company shall forthwith adopt an agreement dated the 23rd of February, 1904, and made between the Old Company of the one part and Herbert Francis Wreford
159 as trustee for this Company of the other part, and the Directors shall carry the said agreement into effect with full power nevertheless from time to time to agree to any modification of the terms thereof either before or after the adoption thereof. The basis on which the Company is established is that the Company shall acquire the property comprised in the said agreement on the terms therein set forth subject to such modification (if any) as aforesaid, and the Directors of the Old Company are to be the first Directors of this Company, and accordingly it shall be no objection to the said agreement that the Old Company as promoters stands in a fiduciary position towards this Company, or that in the circumstances no independent Board of this Company present and future is to be deemed to join the same on this basis."

The management of this company is provided for in the following clauses, to-wit:

"114. The management of the business of the Company shall be vested in the Directors, and the Directors in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such powers, and do all such acts and things as may be exercised or done by the Company, and are not hereby or by statute directed or required to be exercised or done by the Company in General Meeting but subject nevertheless to the provisions of the statutes, and these presents, and to any regulations from time to time made by the Company in General Meeting, provide that no such regulation shall invalidate any prior act of the Directors which would have been valid if such regulation had not been made.

"116. The Directors may from time to time provide for the management and transaction of the affairs of the Company in any specified locality whether at home or abroad in such manner as they think fit, and the provisions con-
160 tained in the three next following Clauses shall be without prejudice to the general power conferred by this Clause."

"118. The Directors may at any time, and from time to time, by power of attorney under the seal appoint any person or persons to be the attorney or attorneys of the Company for such purposes, and with such powers, authorities, and discretions (not exceeding those vested in or exercisable by the Directors under these presents) and for such period and subject to such conditions was the Directors may from time to time think fit, and any such appointment may (if the Directors think fit) be made in favor of the members or any of the members of any Local Board established as aforesaid or in favour of any Company or of the Members, Directors, Nominees, or Managers of any Company or firm or otherwise in favor of any fluctuating body of persons, whether nominated directly or indirectly by the Directors, and any such power of attorney may contain such powers for the protection or convenience of persons dealing with such attorneys as the Directors may think fit."

The Exploration Company incorporated in 1896 was reconstructed and the capital stock reduced in 1904. Cannot say whether Philip L. Foster holds the title to the lands in suit in trust for the liquidators of the old company or on behalf of the new company. The old company had ceased to exist as a corporate entity. The old company had a capital stock of 1,250,000 pounds; among its assets it had a whole lot of things that didn't amount to much, so, instead of transferring all of the property of the old company to the new company, we formed two companies, one, The Exploration Company of 1904, with a capital of 750,000 pounds; the other being called The Exploration Assets Com-
pany which took over 500,000 pounds of this dead
161 wood—the unrealizable assets. The shareholders o. the old company were then given the right to take three shares in the new company for every five shares they held in the old company, and they got in the shares of debenture stock the equivalent of two shares in the assets company for every five shares they held in the old company. The property of the assets company was then gradually realized and the proceeds distributed among the debenture holders of the assets company. The assets company did no business, no new business, and was merely for the purpose of realizing thes

indifferent assets on the old company. The stockholders and officers of the new company were the same as those in the old company. The business of the new Exploration Company was carried along with a portion of the assets of the old Exploration Company in much the same way as it had been previously carried on under the old organization. Exhibits B. and C. define my powers as managing director and member of the Board of Directors of the two companies. My appointment was originally made under the old corporation, probably about June 19, 1896, and my appointment was confirmed by the new company. At the present time Philip L. Foster acts as agent in the United States for the company formed in 1904 under his power of attorney executed September 23, 1904. I was acquainted with Mr. Charles A. Molson and slightly with Henry Burrell. Am not acquainted with John Davis of Salt Lake, formerly of Delta. Had a man by the name of Donohue working for me in Montana for a number of years and if this is P. J. Donohue I am acquainted with him. First met Mr. Molson in about 1886. Believe he was employed by the Exploration Company from about 1898 or '99 to his death. The Exploration Company of 1896 had the first call on his services from about 1896.

162 Plaintiff's Exhibit D identified by the witness as original contract entered into between the 1896 company and Mr. Molson on August 1, 1900, and was introduced in evidence. This Exhibit D. is as follows, to-wit:

163 An Agreement made this first day of August One Thousand nine hundred between The Exploration Company Limited of 11 Cornhill in the City of London (hereinafter called "the Company") of the one part and Charles Atkinson Molson of Salt Lake City, Utah, in the United States of America but at present temporarily in London, Mining Engineer (hereinafter called "Mr. Molson") of the other part.

Whereby in substitution for the Agreements heretofore existing between the parties it is agreed as follows:

1. Upon and subject to the terms of this agreement Mr Molson shall continue to act as heretofore as Advising Mining Expert of the Company in America and elsewhere and as such shall discharge all such duties as may be from time to time reasonably required of him by or on behalf of the Company.

2. Subject to any other specific instructions he may receive Mr. Molson shall forthwith proceed to the United States of America and there either alone or in cooperation with such other person or persons as may be from time to time named for that purpose by or on behalf of the Company

search for and do his best to acquire for and on behalf of the Company Options or other Rights over mining or other properties suitable for the purposes of the Company on the best terms possible but so that Mr. Molson shall have no right or power to commit or bind the Company absolutely to the payment of any moneys except to such extent as he may from time to time have previously been expressly authorized to do so by or on behalf of the Directors of the Company.

3. Mr. Molson shall also as and when required by the Company examine and report on mines or other properties for any other parties but all such reports shall be sent through the Company. In addition Mr. Molson shall be entitled (so far as he can do so without at any time interfering with his duties and obligations to the Company which shall at
164 all times have the first claim upon his time and attention) to examine and report on properties for other parties himself receiving and being entitled to all fees or remuneration that may be paid by such parties for the same.

4. Mr. Molson shall in the discharge of his duties to the Company conform to and act upon all such orders regulations and directions as may be from time to time given to him by or on behalf of the Company or the Directors thereof and shall make to the Directors all such returns and furnish all such reports accounts and statements as may be from time to time required from him.

5. Mr. Molson shall (without any additional remuneration beyond that herein provided for) as and when required by or on behalf of the Company visit the properties of any other Company or persons in which the Company may be in any way interested or concerned or may be contemplating becoming interested or concerned in and shall take such part in the general supervision or management of the affairs or business of any such Companies or persons as the Company may require and shall there in act upon and in accordance with all such orders or directions as may from time to time be given by or on behalf of the Company or the Directors thereof. All fees salaries or other sums of money paid for services rendered or work done by Mr. Molson under this clause shall be received by and belong to the Company absolutely without Mr. Molson having any participation therein his remuneration for all such work and services being covered by the salary and other moneys hereinafter provided to be paid to him by the Company.

6. Where as distinguished from matters dealt with in and provided for by the last preceding clause Mr. Molson is employed by the Company to examine and report on mines or

other properties and the Company is paid by such other
165 parties a special fee for the same Mr. Molson shall in addition to his other remuneration hereunder be entitled to receive half of such fee the amount of which shall be mutually arranged between Mr. Molson and the Company [befor] the examination is undertaken.

7. During the continuance of this Agreement Mr. Molson shall except to the extent hereinbefore specially provided for and allowed by Clause 3 devote his whole business time and attention exclusively to the business and affairs of the Company and such other matters as the Company require him to attend to and he shall not either directly or indirectly be engaged concerned or interested in any other trade business or occupation either alone or jointly with or on account of any other person or persons Company or Companies in any capacity whatever and shall use his utmost endeavors to push promote and extend the business of the Company or any other business as to which he may be employed by or on behalf of the Company.

8. Mr. Molson shall not during the continuance of this engagement either directly or indirectly acquire or seek to acquire any properties or rights for or on behalf of himself or any other person or persons Company or Companies and in the event of Mr. Molson in breach of this Agreement acquiring any properties or any interest therein for or on behalf of himself or any parties other than the Company he shall if so required by or on behaf of the Company make the same over to the Company or as the Company may direct everything acquired by Mr. Molson during the [continuabce] of this Agreement being deemed to be acquired by him for and on account of the Company so far as the Company may be ready and willing to accept the same.

9. Mr. Molson shall not either directly or indirectly except on account and for the benefit of the Company and with the knowledge and approval of the directors or Managing Directors of the Company communicate either verbally or otherwise with any person or persons Company or
166 or Companies on any of the affairs or business of the Company but shall maintain and preserve the secrets of the Company as also those of any other Company or business in connection with which he may be employed by or on behalf of the Company.

10. The engagement the subject of this Agreement shall continue for one year from the First day of August One Thousand nine hundred and thereafter until the same shall be terminated either at the end of such year or at any later date

by three calendar months previous notice in writing given by or on behalf of either party to the other and any such notice shall be sufficiently given if in the case of a notice to Mr. Molson it is delivered to him or sent to him by post or cablegram addressed to his last known place of abode or residence or in the case of a notice to the Company left for the Company at the Registered Office for the time being of the Company in London.

11. The remuneration of Mr. Molson shall be in salary at the rate of Two Thousand pounds per annum payable quarterly together with Mr. Molson's reasonable travelling and hotel expenses when travelling on account and for the purposes of the business of the Company and in addition thereto Mr. Molson shall upon and in respect of any business he may be called upon to investigate and report upon by or on behalf of the Company and which shall afterwards as the result of and upon the strength of his report be taken up by the Company be entitled to and shall receive a commission equal to five per cent on the actual net profit made and received by the Company on such business after repayment of all capital or other outlay or expenditure made by or on behalf of the Company in connection with such business and interest in such expenditure at the rate of five per cent per annum from the date of the money being outlaid until it is repaid and the Certificate of the Company's Auditor for the time being as to the amount of the profit made by the Company on any such business shall be final and conclu-
167 sive and Mr. Molson is only to be entitled to receive his five per cent share thereof in the same shape in which the Company may themselves have actually received the same. In the event of the Company finding it necessary or desirable to give off any share or interest or other participation in any such business to any other person or persons Company or Companies (and which the Company is to be at liberty to do on any grounds the Company may think fit) profits made by any such parties shall not be deemed to be profits upon which Mr. Molson is entitled to his commission of five per cent but such commission shall only extend to the profits actually made and received by the Company for their own use.

12. If at any time any doubt, difference or dispute shall arise between the parties hereto touching this Agreement or the construction thereof or the rights or claims of either party hereunder the same shall be referred to Arbitration in London under and in pursuant to the provisions in that behalf of the Arbitration Act of 1889 or any then subsisting statutory modification thereof.

As witness the hands of the parties the day and year first above written.

THE EXPLORATION COMPANY, LIMITED,

(Sgd) R. T. Bayliss,
Managing Director.

(Sgd) C. A. MOLSON.

Witness to the signatures of the Exploration Coy Ltd and C. A. Molson.

(sgd) J. H. M. SHAW,
11 Cornhill
E. C.

168 I do not know whether the same contract and agreement was continued between The Exploration Company, Limited, of 1904, and Mr. Molson. There was a subsequent arrangement made, but I do not know the date of it.

Plaintiff's Exhibit E, consisting of nine sheets of paper attached together, identified by the witness as complete records of The Exploration Company, Limited, relating to the appointment of Mr. Molson and his employment by the Company, and introduced in evidence. This Exhibit E shows that the employment of Mr. Charles A. Molson under said contract, Plaintiff's Exhibit D, continued with both companies up to August 8, 1906.

Plaintiff's Exhibit F, consisting of copies of a number of pages attached together, the first two of which purport to be a certificate by Deloitte, Plender, Griffith & Co., chartered accountants, the next 25 sheets purporting to be copy in long-hand of various accounts taken from the books of account of The Exploration Company, Limited, and the last sheet which forms part of the cover being a synopsis of the contents of the other sheets, were identified as being what they purport to be and introduced in evidence, counsel for defendants waiving objections to the introduction of these copies instead of the original papers.

169 Portions of said Exhibit "F" are as follows, to-wit:

Deloitte, Plender, Griffiths & Co.,
5. London Wall Buildings,
London, E. C.
12th. August, 1914.

H. F. Wreford, Esq.,
Secretary,
The Exploration Co. Ltd.,
24. Lombard Street, E. C.

Dear Sir:

We have compared the Schedules hereto attached, Nos. 1/12, as per detailed list set out below, with the corresponding

accounts and entries in the books of the Company, and certify that they are a true copy thereof.

List of Schedules referred to:

The Exploration (1896) Co. Ltd.

No. 1. Copy of C. A. Molson Private Account in the Company's Ledger from 1st. January 1901 to 21st. March 1904.

No. 2. Copy of C. A. Molson Capital Account in the Company's Ledger from 8th February 1901 to 21st. March 1904.

No. 3. Copy of C. A. Molson Expense Account in the Company's Ledger from 1st. July 1901 to 21st. March 1904.

No. 4. Copy of seven entries from the Journal of the Company extending over the period from September 1902 to 21st. March 1904, relative to the Colorado Coal Scheme.

No. 5. Copy of the Colorado Coal Scheme Account in the Company's Ledger from September 1902 to 21st. March 1904.

The Exploration (1904) Co. Ltd.

No. 6. Copy of C. A. Molson Private Account in the Company's Ledger from 21st. March 1904 to 4th. October 1906.

No. 7. Copy of C. A. Molson Capital Account in the Company's Ledger from 8th. May 1904 to 30th. December 1905.

No. 8. Copy of C. A. Molson Expense Account in the Company's Ledger from 21st. March 1904 to February 1906.

No. 9. Copy of C. A. Molson General Account in the
170 Company's Ledger from 7th. February 1906 to 2nd. December 1908.

No. 10. Copy of C. A. Molson Suspense Account in the Company's Ledger from 31st. August 1906 to 31st. March 1912.

No. 11. Copy of five entries from the Journal of the Company extending over the period from 30th. June 1904 to 18th. May 1907, relative to the Colorado Coal Scheme.

No. 12. Copy of the Colorado Coal Scheme Account in the Company's Ledger from 21st. March 1904 to 31st. March 1914.

We are,

Yours faithfully,

DELOITTE, PLENDER,
GRIFFITHS & CO.

Schedule No. 1, referred to in the above certificate of Deloitte, Plender, Griffiths & Co., is entitled, "Copy of account in the Sundry Persons Ledger of the Exploration Company, folio 175, C. A. Molson, Private Account". The debtor side of this account shows the following among other entries:

1902		£.	s.	d.
May 7	To Cash, per Martin's Bank, $17,500 @ $4.87½ - £3589-14-10 Cabling same - - - 7-00	3590	1	
Apr. "	Cash, per Edward Sweet & Co. Amount cabled $16,000 @ $4.87-15/16.	3279	2	2
May 8 "	Commercial Cable Company, (To Salt Lake City, April 1st charged in error transferred) to Sweet New York City April 9th.		17	6
Jun 30 "	Western Union Telegraph, To Salt Lake City, May 5th, 3 words.		4	6
Sep. 21 "	Cash, Cable to Ed. Sweet & Co., $8,123 @ $4.86¼ Cable 12 s.	1671	3	
Nov. 11 "	E. Sweet & Co., $2430 @ $4.87.	498	19	6
1903				
Jul. 20 "	C. A. Molson Expense Account transferring cable remittance $8,000 June 4, 1903, and cost of sundries same.	1637	19	

1904		£.	s.	d.
Feb. 10	To Cash—Draft in favor of Wells Fargo, Salt Lake City, for his account, $2023.75 @ $4.84¾.	500		

The credit side of the account designated as Schedule No. 1, and entitled as above, shows the following among other items:

1902		£.	s.	d.
May	By C. A. Molson Expense Account for cable April first, Colorado Coal, charged in error.		10	6

Schedule #2, above referred to in the certificate of Deloitte, Plender, Griffiths & Co., is entitled "Copy of account in the Sundry Persons Ledger of the Exploration Company, Folio 171—C. A. Molson Capital Account". The debit side of this account shows that C. A. Molson was charged with having received various sums as private salary from January 1, 1901, to February 8, 1904. The credit side of this account shows that on December 31, 1901, he was credited with the sum of £2,000 for sundry investigations. December 31, 1902, he is likewise credited £2,000 for sundry investigations. December 3, 1903, he was likewise credited by Sundry investigations £2,000.

Schedule #3, attached to the certificate of Deloitte, Plender, Griffiths & Co., is entitled "Copy of account in the Sundry Persons Ledger, the Exploration Co., Ltd., Folio 173, C. A. Molson Expense Account. Certain items on the debit side thereof are as follows:

1902		£.	s.	d.
Jan. 24	To Cash, per Martin's Bank, $2,424.25	500		
May 5	" Cash, per Martin's Bank Cabled to Salt Lake City $14,000 @ $4.88.	2,868	17	1
May 20	" C. A. Molson Private Account For Cable April 1st to Colorado Coal. Charged in error to Private Acct.		10	6

172 1902		£.	s.	d.
Dec. 17	To Colorado Coal, Reversal,	3,897	2	6
1903				
Jul. 24	To Colorado Coal $13.55 returned by M. Fairland, and $87.67 wrongly charged by C. A. M. to Colorado Coal account—to be corrected.	20	14	10

The credit side of the account designated as Schedule No. 3, shows the following among other entries:

1902		£.	s.	d.
Sep. 11	By Colorado Coal, transfer of amts. Cabled $19,000	3,897	2	6
Dec	" Colorado Coal, amount expended, $15,120.27 @$4.88.	3,098	8	4

Schedule #4 attached to the certificate of Deloitte, Plender, Griffiths & Co. is entitled, "Copies of entries in the journal of the Exploration Co., Ltd., Certain items of which are as follows:

1902		£.	s.	d.
Sep.	Colorado Coal Scheme, Dr. C. A. Molson expense transfer. of $19,000. p. act. Molson and used in purchasing coal properties.	3,897	2	6
Dec. 31	C. A. Molson, Expense a/c Dr. Colorado Coal Scheme reversal.	3,897	2	6
Dec. 31	Colorado Coal Scheme C. A. Molson expense for $15,120.27 @ $4.88, amount expended hereon.	3,098	8	4
Dec. 31	Colorado Coal, Cables to Molson May and October, 1902.	1	0	4
Dec. 31	C. A. Molson, Dr. Colorado Coal $7.50 and $87.60.	21	11	0
1903				
July 24	C. A. Molson, Colorado Coal, $3.55 amount returned by M. Fairland and $87.67, amount charged to latter account in December, 1902 (fol. 10), now reversed. Total $101.22 at $4.88.	20	14	10
1904				
Mar. 11	Colorado Coal.		10	6

Schedule No. 5 attached to the certificate of Deloitte,
173 Plender, Griffiths & Co. is entitled, "Copy of Account in the Investment Ledger of the Exploration Co., Ltd., (Fol. 12) Colorado Coal Scheme. The items on the debit side of this account are as follows:

1903			£.	s.	d
Sep.	To	C. A. Molson Expense Acct. $19,000.	3,897	2	6
Dec. 20	"	C. A. Molson Expense $15,120.27.	3,098	8	4
Dec. 31	"	Sundry investigations, Cables.	1	4	0
Dec. 31	"	C. A. Molson $105.70	21	11	0
1904					
Jan. 1	"	Balance $15,124.22	3,100	8	6
Mar. 21	"	Western Union		10	6

The credit side of the account designated as Schedule No. 5 embraces the following items:

1902			£.	s.	d.
Dec. 23	By	C. A. Molson, Expense reversal, $19,000.	3,897	2	6
1903					
Jun. 24	"	C. A. Molson, Adjustment of expenditures, $101.22.	20	14	10
Dec. 31	"	Balance, $15,124.22	3,100	8	6
1904					
Mar. 21	"	Liquidator.	3,100	19	6

Schedule No. 6, attached to the certificate of Deloitte, Plender, Griffiths & Co., is entitled, "Copy of Account in the Sundry Persons Ledger in the Exploration Co., (Fol. 111)—Charles Atkinson Molson Private Account." This schedule contains no items which on their face bear directly upon the accounts relating to the lands in question, but show that from March 20, 1904 to October 4, 1906, C. A. Molson was debited with certain amounts on account of salary and credited by numerous investigations for the Exploration Co., Ltd., and also includes other items showing there was a joint
174 account existing between himself and the corporation.

Schedule No. 7, attached to the certificate of Deloitte, Plender, Griffiths & Co., is entitled, "Copy of account in the Sundry Persons Ledger of the Exploration Co., Ltd.,—Charles Atkinson Molson Capital Account." The items on the debtor side of this account relate entirely to the salary

paid to Mr. C. A. Molson by the Exploration Company, Ltd., from May 8, 1904 to and including December 31, 1905. The items on the credit side of this account show that Mr. Molson was credited by sundry investigations from December 31, 1904 to December 30, 1905.

Schedule No. 8, attached to the certificate of Deloitte, Plender, Griffiths & Company, is entitled, "Copy of account in the Sundry Persons Ledger of the Exploration Co., Ltd.—Charles Atkinson Molson Expense Account." There are no items in this account which specifically refer to the lands involved or any expenditures with relation thereto, but the account on the whole shows that from May 5, 1904, to February, 1906, various transactions were carried on between C. A. Molson and the Exploration Co., Ltd., which included the rendition of services by Molson to the corporation, payment for the same and certain transactions relating to the purchase of the stock of various corporations.

Schedule No. 9, attached to the certificate of Deloitte, Plender, Griffiths & Company, is entitled, "Copy of account in the Sundry Persons Ledger of the Exploration Co., Ltd. (Fol. 113)—Charles Atkinson Molson General Account. This account contains no items referring specifically to the lands involved in this suit or to any expenditures with relation thereto, but appears to be a general account relating to the purchase and sale of stocks between C. A. Molson and the
175 Exploration Co., Ltd., and the charges in payment for services rendered by Molson to the corporation for sundry investigations.

Schedule No. 10, attached to the certificate of Deloitte, Plender, Griffiths & Company, is entitled, "Copy of account in the Private Ledger of the Exploration Co., Ltd., (Fol. 95)—Charles Atkinson Molson Expense Account." This account covers a period of time commencing August 31, 1906, and ending March 31, 1912. This account covers the purchase and sale of stocks and other transactions between C. A. Molson and the Exploration Co., Ltd., none of which, apparently, refer to the lands in question.

Schedule No. 11, attached to the certificate of Deloitte, Plender, Griffiths & Company, is entitled, "Copies of entries

in the journal of the Exploration Co., Ltd." The following, among other items, are found therein:

			£.	s.	d.
Fol. 21					
1904					
Jun. 30	Colorado Coal, Dr.		127	16	11
	To C. A. Molson Expense Acct.,				
	Traveling Expense	$165.75			
	Taxes	453.02			
	Total	$618.77			
	@ $4.84				
Fol. 88					
1905					
May 8	Colorado Coal, Dr.		167	5	8
	To C. A. Molson Expense Acct.,				
	Delta County Taxes				
	1904	$678.62			
	Gunnison Co. taxes				
	1904	136.05			
	Total	$814.67			
	@ $4.87.				
Fol. 25					
1907					
Jan. 14.	Colorado Coal, Dr.		182	13	2
	To C. A. Molson for taxes, $887.73 @ $4.86.				
Fol. 67					
1907					
Jul. 11	Colorado Coal, Dr.		193	1	9
	To New York Office, cash, Taxes on coal lands $937.20 @ $4.85⅜				

			£.	s.	d.
176	Fol. 158				
	1907				
May 18	Sundry Investigations, Dr.		22	5	0
	To Colorado Coal, $118.25, stated by C. A. Molson in his letter of 18/5/07 to be chargeable to general expense and not to this acct.				

Schedule No. 12, attached to the certificate of Deloitte, Plender, Griffiths & Company, is entitled, "Copy of account in the Investment Ledger of the Exploration Co., Ltd., (Fol. 116) Colorado Coal." The items contained therein are as follows:

			£.	s.	d.
1904					
Mar. 21	To purchase of assets $15,124.22.		3100	19	0
Jun. 30	" C. A. Molson Expense Acct. Taxes, etc. $618.77.		127	16	11
1905					
May 8	" C. A. Molson Expense Acct. Taxes, etc.	$814.67	167	5	8
1907					
Jan. 14	" C. A. Molson Expense Acct. Taxes, etc. $887.73.		182	13	2
Jul. 11	" New York Office $937.20		193	1	9
1908					
Jan. 1	" Balance $18,274.44		3749	11	6
Oct. 1	" New York Office, Taxes for 1907		213	11	1
	Gunnison County...	$ 207.76			
	Delta County.....	822.24			
	Fairland for serv's.	10.00			
	Total.....	($1040.00)			
Oct. 28	" Fairland, per Jas. Curtis, Delta and Gunnison $3.00			12	4
1909					
Apr. 1	" Fairland, taxes, ½ of 1908, Delta $391.40 Gunnison 324.40		145	18	5
Oct. 1	" ½ of taxes, 1908, Delta and Gunnison $391.40		80	7	4
Oct. 1	" Taxes for 1908, Millard Fairland for services $10.00.		2	1	1
Dec. 31	" Millard Fairland, For services to 11/8/10.		2	1	1
1910					
Jan. 1	" Balance, $20,434.34.		4193	1	9
Mar. 31	" New York Office, taxes,		106	15	6

177	1910		£	s.	d.
Mar. 31	(Entry continued) ½ of 1909,				
	Delta	$387.60			
	Gunnison	132.40			
Sep. 30	To New York Office, taxes, ½ of 1909,		106	15	6
	Delta	$387.60			
	Gunnison	132.40			

1911					
Mar. 31	"	New York Office, ½ of 1910 taxes Delta . . . . . $342.00 Gunnison . . . . . 193.51 Millard Fairland to Aug. 11, 1911 . . . . . 10.00	112	2	7
Sep. 30	"	New York Office, ½ of 1910 taxes, $535.51	110	0	4
1912					
Mar.	"	New York Office, ½ of 1911 taxes,			
		Gunnison $220.18	45	3	4
		Delta 368.60	75	12	2
		1 yr. Millard Fairland to Aug. 11, 1912 . . . . . 10.00	2	1	0
Sep.	"	New York Office, ½ taxes 1911,			
		Gunnison $220.18	45	4	3
		Delta 368.60	75	13	9
1913					
Apr. 1	"	½ taxes 1912,	152	19	11
		Delta $387.60			
		Gunnison 348.64			
		M. Fairland 10.00			
Sep. 30	"	½ 1912 taxes,	151	8	3
		Delta $387.60			
		Gunnison 348.64			
Dec. 31	"	M. Fairland for services in reduction of taxes $60.00	12	6	5
1914					
Mar. 31	"	Gunnison taxes, ½ of 1913 . . . . . $408.	83	17	4
Mar. 31	"	Delta taxes, ½ of 1913 . . . . . $555.78	114	4	'10

The credit side of said account shows the following items:

			£	s.	d.
1907					
May 18	By Sundry Investigations, Reversal of expenses $148.15.		22	5	0
Dec. 31	" Balance $18,274.44.		3749	11	6
178	1909		£	s.	d.
Dec. 31	By New York Office Reversal $10.		2	1	1
Dec. 31	"Balance, $20,434.34		4193	1	9

179 Q. (By counsel). Referring to Exhibit F, I find a sheet which is marked "Schedule No. 5". At the head of that sheet is the following: "Copy of account in the investment ledger of The Exploration Company, Limited (Folio 12). Colorado Coal Scheme." Did your company ever have any other coal scheme than the one which involved the lands in this suit?

A. Not to my knowledge.

Q. Was either the old company of 1896 or the new company of 1904 ever interested in any coal lands in the State of Colorado other than the coal lands involved in this suit?

A. Not to my knowledge.

Q. Was either of your companies ever interested in any coal lands situated in any other place than the State of Colorado which you designated as "The Colorado coal lands" or as "The Colorado Coal Lands Scheme."?

A. Not to my knowledge.

Plaintiff's Exhibit G, consisting of a letter dated May 2, 1914, signed "Frank Hall, Special Assistant to the Attorney General" and directed to Vaile, McAllister and Vaile, requesting that this witness produce certain records of The Exploration Company, Limited, at the taking of his deposition, a letter signed by the witness and addressed to H. F. Wreford as Secretary of The Exploration Company, Limited, dated July 20, 1914, asking him to comply with the request contained in said letter of May 2, 1914, and a letter dated August 19, 1914, directed to the witness as Chairman of The Exploration, Limited, and signed by Mr. H. F. Wreford, as Secretary of the Company, stating the instruments which he was able to obtain and that there were no others that were called for in existence or in possession of the Company, introduced in evidence. Said letter from Mr. Wreford to the Witness is as follows:

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THE EXPLORATION COMPANY, LIMITED,

24 Lombard Street, E. C.
London, August 19th, 1914.

R. T. Bayliss, Esq.,
Chairman,
The Exploration Co. Ltd.,
24. Lombard Street, E. C.

Dear Sir;

Complying with the request contained in your letter of July 20th, 1914, I beg to submit, herewith, the following report:

(1) There is no Power of Attorney in the possession of the Company, given by The Exploration Company, Limited, to one, Charles A. Molson, authorizing and empowering him to act as the agent and Attorney in fact for said Company in the United States.

(2) I hand you, herewith, copies of all records of The Exploration Company, Limited, showing the appointment or election of R. T. Bayliss to the position he occupied with the Company during the period of time commencing January 1, 1901, and continuing up to the present time. In this connection I also hand you, herewith, copies of the several Articles of Association disclosing the exact powers and duties of the positions which Mr. Bayliss held during the period above mentioned in so far as such powers and duties have been prescribed.

(3) I hand you, herewith, copies of all items appearing upon the books of account of The Exploration Company, Limited, which show what sum or sums were expended by the Company in the procurement of title to the so-called Colorado Coal Lands, and also copies of, all accounts in the books of the Company in the name of Charles A. Molson. There are no books of account of Charles A. Molson or R. T. Bayliss in the possession of the Company.

(4) There are no letters, books, papers or documents in the possession of the Company relating to or in anywise appertaining to the title to the lands referred to.

181 (5) There are no letters or correspondence between Philip L. Foster, Charles A. Molson, Alexander Burrell, Henry Burrell, Albert L. Smith, John Davis, Millard F. Fairlamb or P. J. Donohue, and The Exploration Company, Limited, in the possession of the Company respecting the acquisition of title by The Exploration Company, Limited, to the lands in suit.

(6) There are no copies or originals of deed of Conveyance in the possession of the Company, in any manner affecting the title to the lands involved.

(7) I hand you, herewith, certain correspondence and copies of correspondence which taken together from the Contract between The Exploration Company, Limited, and Charles A. Molson, by which Molson received, in addition to other compensation, 20% of the profits arising from lands or mining property that should be recommended to The Exploration Company, Limited, by him, and upon such recommendation purchased by the Company. I also hand you, herewith, the original Contract between The Exploration

Company, Limited, and Charles A. Molson, which was in force from 1. August 1900 until the 20% contract became effective on the 8th August 1905.

(8) With the exception of the certified copies of the several items of accounts furnished you under paragraph No. three (3) above, there are no other items referring to this matter in the books of account of The Exploration Company, Limited, between that Company or its authorized representative or representatives in America, and Charles A. Molson, Alexander Burrell, Henry Burrell, John Davis, P. J. Donohue, Millard F. Fairlamb, Albert L. Smith, Emma F. Nutter, Maggie E. Holmes, Ella Davis, Charles P. Nutter, Edyth Cartwright, Anna Nutter, Daniel S. Baldwin and Stella M. Fairlamb.

I am, Dear Sir,

Yours faithfully,

THE EXPLORATION COMPANY, LIMITED,

(Signed) H. F. Wreford,
Secretary.

182 I think this response contained in the letter of Mr. Wreford is a correct and complete answer to the call for these various instruments. I and Mr. Shaw were duly appointed by the shareholders of the old company as liquidators for that company. Both Mr. Shaw and myself were directors in the old company and have been directors in the new company since its incorporation. As such liquidators we have not made a final report to the old company. These liquidators as representatives of the 1898 corporation do not claim any interest in the lands involved in this suit. The taxes upon these lands are paid by the new company.

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183 (Note—The following testimony was taken in open court at the time of the final hearing.)

M. D. McENIRY testified for the plaintiff:

I reside in Denver, Colorado. I am chief of the Denver Division of the General Land Office with headquarters in Denver. This division includes Colorado, Kansas, Oklahoma and special work in Nevada. I have occupied this position since the early part of April, 1907. Prior to that time I was chief of the Field Division in the North Dakota Division and also chief of the Field Division of the southern division of Little Rock. I am familiar with the suit now pending against the

Exploration Company, Limited, and Philip L. Foster. The transactions which concerned the entries in question were first brought to my attention on October 24, 1908, when the Department, through the chief of the Field Service at Washington sent instructions that came from Secretary Garfield to investigate all of the entries in two townships in the western part of Colorado in which the lands involved in this suit are located, whether the statute of limitations had run or not. In pursuance of these instructions I assigned special agents Ralph Kelley and James Anderson to proceed to these two townships and make an examination of all the coal entries, whether the statute of limitations had run against them or not. There was nothing in the instructions which I received which invited my attention to the particular lands in question or to the defendant, the Exploration Company, Limited, or Philip L. Foster. That information did not come until long after the investigation started. Mr. Kelley started in the last part of October or the first part of November to make an investigation of the Utah Fuel Company and the Juanita Coal & Coke Company. At that time I did not know of any other company or association or corporation that had acquired lands in that vicinity. In February, 1909, a report came to me verbally and in a written memorandum
184 that there were lands that had been acquired in that vicinity by people who appeared to be acting for people in Salt Lake—a man by the name of Molson, Donohue, and a man by the name of Davis. In the latter part of February, 1909, the first information came to me in regard to the connection of the Exploration Company, Limited, with these entries. Mr. Anderson, who was then connected with our office, had interviewed Donohue and Davis, had taken certain statements from them in writing, from which it was apparent that there was a Mr. Bayliss, a Mr. Molson and a Mr. Alexander Burrell who were back of these entries and who were supposedly furnishing the money by which they were made. Then I made some inquiry as to whom the Exploration Company, Limited, was, and I found that there was a Mr. Foster in New York City who was supposed to be their American representative. I called on Mr. Foster in New York in March, 1909, He admitted that he was the representative of this company—in fact, showed me his power of attorney—and I questioned him as to the title to these lands, as to whether he held the legal title for the company or was holding the title as a bona fide purchaser. He refused to answer the question until [be] consulted his attorney. He informed me as to who the Exploration Company, Limited, of London was, as to the character of the organization, and

said they owned lots of mining property all over the world. He said that personally he did not know anything of the transactions between the chairman of the Board, Mr. Bayliss, and the men in this country, a Mr. Molson and a Mr. Burrell, as he was not at the time these entries were initiated their representative. With respect to the lands I told him that the records showed that the title to the lands were in this Mr. Burrell, and he said that should not be so as he had been paying the taxes on them. He did not tell me why the title was held in his name. From his conversation I inferred that the title to the lands in question were held by him in trust
185 for the Exploration Company, Limited, although he did not answer the question as to whether he held the legal title or was a purchaser in good faith. My understanding from our conversation was that he was holding it in trust for the Exploration Company. After this conference I received further information in regard to the making of these entries and the transfer of title, from the reports of agents Kelley and Anderson. This report was received in my office some time in April, 1909. I forwarded this report to the commissioner of the General Land Office at Washington with all the exhibits and papers that we had gathered up in connection with the entries. We usually discover frauds similar to the ones complained of in this suit by looking up the records in the county offices, then getting the names of the entrymen and their last post office address. Then we interview these people. If there are any transferees we try to interview them in order to follow the title down to the real owners and get the information as to how they came to have the land—whether they were purchasers in good faith or not. At the time this investigation started there were dozens of other corporations and companies actively engaged in similar transactions in this locality. Prior to the investigation of the lands involved in this suit I had never heard of the Exploration Company.

On Cross-Examination, the witness testified as follows:

I do not think I am mistaken when I testified that I told Mr. Foster these lands stood in the name of Burrell. Our examination of the county records showed that six of these entries still stood in the name of Alexander Burrell. I asked Mr. Foster about it and he stated that the entries in question were assessed to him and that they should be recorded in his name, and not in that of Alexander Burrell. He showed me the dates
186 on which the recorder had certified that they had been recorded in his name in 1907. I think we got abstracts of title and the abstracts showed the lands to be in Mr.

Burrell's name, and Mr. Foster said that was not correct. It may be a fact that these deeds to Mr. Foster were all recorded in April, 1906, but my information at the time was rather fragmentary. I first came to Colorado in April, 1907, when I became chief of this Division. Up to 1909, at the time when I had this conference with Mr. Foster, the Exploration Company was not known to the General Land Office or to my office as one that was engaged in coal frauds in Colorado. The first time that I ever heard of the Exploration Company, Limited, as owning or having any interest in property in Colorado was when I had my talk with Mr. Foster. My attention was first called to this matter in a letter of October 24, 1908. The primary object of this letter was to investigate alleged frauds of the Utah Fuel Company and the Juanita Coal & Coke Compjany. The instructions from Mr. Garfield were: "Secretary Garfield directs that you investigate as to all the lands in these townships, regardless of the running of the statute, and that if it is ascertained that the coal companies that are now in possession of the lands fraudulently acquired them, a demand will be made upon them to reconvey the same, notwithstanding patents might have been more than six years old". The coal companies referred to were those two that I have mentioned. The Exploration Company was not mentioned in the letter, and we had no information at that time with respect to the Exploration Company. The results of the investigation of my agents were put in writing, submitted to me and by me submitted to the Commissioner of the General Land Office in April, 1909. Prior to that time, in March, I had my talk with Mr. Foster. We talked about the transfer to Smith. I asked him about this Mr. Smith where some of the titles went, and he said he did not know Smith but that he believed he was a banker and arrangements had
187 been made by his purchaser. Mr. Foster told me he had no knowledge of this transaction or the facts which occurred prior to his becoming the agent of the Company in the United Stated.

Q. Isn't it true that that matter of consulting his attorney arose in this manner: that you asked Mr. Foster if he would answer a number of written questions that might be submitted to him afterwards by you, and sent to Washington, and he then said that he would want to consult with his attorney with respect to answering those questions? Aren't you somewhat confused on that matter, Mr. McEniry? A. No, I put the question to him this way: "Are you merely the legal holder of this title for this company, or, in other words, the depositary of this title?"; he didn't answer. He stated that before answering a question of this character, he would first like to consult with their legal representative. When I put this ques-

tion to him about the title to these lands, he didn't answer. He was very nice and courteous about it.

Q. But, any way, during this conversation, you were led to understand that he held title for the Exploration Company?

A. I had no doubt as to that.

Q. You were just as sure of that as if he had told you?

A. Yes, but as a matter of fact, he didn't tell me.

Q. He didn't tell you that he held title to this land for the Exploration Company?

A. He didn't answer the question.

Q. That was the first time that you had ever attempted to see Mr. Foster, wasn't it? A. The first and only time.

Q. And nothing that was said in that conversation misled you as to the real owner of this property being the Exploration Company, Limited?

A. No, not at that time, no. I was satisfied in my own mind that they were the owners.

188 Neither at nor time prior to the initiation of the general investigation under the letter of October 24, 1908, had my office, either under me or under my predecessor ever investigated the circumstances involving the particular entries in question in this case or any of the facts with respect to these entries. There had been no effort upon the part of the Department to ascertain what the facts were until the letter of October 24, 1908. My records would show if there had been any such investigation, and I am certain there is nothing in the records in our Department with reference to these lands, and I am sure there is nothing in our office. The Exploration Company has never been engaged in coal mining in Colorado that I know of. In so far as the conveyance of title after the original entries were made, the Department never examined the records to ascertain who the record owner of the property was, until October 24, 1908. That was the initiation of the investigation. We had then been engaged in examination of title records in Gunnison and Delta Counties, Colorado for sixteen or eighteen months and if such records had shown a conveyance of these lands to this foreign corporation we would have commenced an investigation, because a foreign corporation can't own coal lands in this state. My office, and my predecessor's office, never had occasion prior to the initiation of this investigation on October 28, 1908, to run down the titles to the land involved in this case.

RALPH S. KELLEY testified for the plaintiff:

I am special agent for the General Land Office and have been such for something over eight years. Am familiar with

the investigation made by the office respecting the transactions surrounding the entry of the lands involved in this suit. Received instructions from the chief of the Field Division in Denver, Mr. McEniry to make this investigation, I believe it was in the first part of November, 1908. The investigation was not started at that time. Was instructed to investigate the coal land entries made in townships in Gunnison and Delta
189 counties, to ascertain whether or not these entries or some of them had been made for the Utah Fuel Company and the Juanita Coal & Coke Company. Did not receive any instructions in which the Exploration Company, Limited, or Philip L. Foster were mentioned, nor any instructions in which Alexander Burrell or Albert L. Smith were mentioned. I began the investigation in the month of February, 1909, and the first thing that I did was to examine the records in the county recorder's office in Gunnison and Delta counties to ascertain where the title to these particular lands was at that time. I found that title had passed from the entrymen direct to Alexander Burrell and from him to Albert Smith. The title then passed from Smith to one Philip L. Foster. This was all I could obtain from the record. I then proceeded to make the investigation. I interviewed each of the entrymen and took their affidavits, and also interviewed P. J. Donohue, of Salt Lake City, Utah, whose connection with the matter I had learned of since starting the investigation. Learned of Mr. Donohue's connection with the transaction from one Davis, whose first name I do not remember. Think it was John Davis—the old man, not the son. Inquired of the various entrymen as to whom they conveyed their lands to and they did not know. None of [them] entrymen mentioned the Exploration Company in connection with the lands with the exception of John Davis who was about the last one interviewed, and he was in Nevada. Did not learn that Mr. Foster held the lands for the Exploration Company, Limited, until I interviewed Mr. Alexander Burrell at Helena, Montana, in the fore part of March, 1909. My investigation of these transactions was completed in the first week of April, 1909, when I informed my superior officers of the facts in writing. I believe this was on April 12, 1909. We always make our reports in writ-
ing to the Commissioner of the General Land Office at
190 Washington, and as soon as our investigation [in] completed and transmit that report to the chief of the Field Division to be acted upon before it is transmitted to Washington. I made an investigation in Salt Lake City to ascertain the whereabouts of a contract that had existed between Mr. Donohue and Mr. Davis on the one side and Mr. Molson on the other, in regard to these lands. I interviewed

Mr. Donohue and also one of the members of a firm of attorneys, a Mr. Ingebretzen. I did not find the contract, and came to Denver upon information that Mr. Nye, the partner of Mr. Ingebretzen, was practicing law in Denver and might have the contract in his files, but I was unable to secure it. I assisted in making a search through the files in Mr. Ingebretzen's office for the contract but could not find it. On March 3, 1909, I ascertained that the Exploration Company claimed some interest in these lands. This was at the interview with Mr. Alexander Burrell in Helena. After that I interviewed Mr. Albert L. Smith at Helena, who was one of the [transferrees] in the matter. I did not find anything in the records of Delta and Gunnison counties to show that the title was claimed by or in any manner held in trust for the Exploration Company, Limited.

On Cross-Examination, the witness testified as follows:

When I made my examination of the records I found that the title as to the lands stood in the name of Philip L. Foster. Mr. McEniry made a mistake in saying that the title stood in the name of Burrell. I examined the titles and found a portion of the entries still in Alexander Burrell's name. I failed to follow them down properly, but later ascertained that this was wrong. In 1909 I ascertained that the record title to all the property was vested in Philip L. Foster. I started the investigation about the
1st of February, 1909, and about a month thereafter,
191 on March 3rd, I ascertained the connection of the Exploration Company, Limited, with the titles—within just about a month after I started the investigation. I never had occasion to run down the titles or records of these particular lands until I was assigned to the matter that I have just testified about. I was never called upon to investigate anything regarding the facts of these entries or the subsequent conveyances of the property until the investigation with reference to which I have just testified. The general investigation commenced after the letter of October 24, 1908, but it was not until February of the following year that I took up this particular transaction.

GEORGE L. NYE testified for the plaintiff:

I am an attorney at law and reside in Denver. I was engaged in the practice of law at Salt Lake City, Utah, between 1892 and 1905, and was acquainted with one Patrick J. Donohue, who was a client of mine. Mr. Donohue brought to me a written contract or written instrument in which appeared the name of one Molson, and it related to coal lands,

as I now recollect it, and I remember the name of Davis, but whether that name was signed to the contract or memorandum or not, I cannot say. My recollection is that the contract or memorandum was returned by me to Mr. Donohue. It might have been left with other papers in Salt Lake City when I left there in February, 1905, but I have no positive recollection of what became of it. The contract is not now in my possession; I have made a search for it.

The plaintiff then offered in evidence certain papers, duly certified under the seal of the Commissioner of the General Land Office as copies of original papers on file in his office as being the original entry papers and patent affecting the lands described at the northwest quarter of section 12, township 13 south, range 91 west, sixth principal meridian,
192 embraced in the coal cash entry No. 45 Ute, made at Montrose, Colorado, May 6, 1902, by Maggie E. Holmes, and marked Exhibit A. These papers are similar to those in Exhibit A in the testimony of witness Edyth Cartwright, Henry Burrell acting as attorney in fact. Date of Patent, October 16, 1902.

The introduction of this exhibit was objected to by the defendant on the ground that there was no testimony introduced concerning this particular entry or the circumstances surrounding the same.

Plaintiff thereupon introduced in evidence duly certified copies of certain deeds, marked Exhibit B to N, inclusive, Exhibit B being as follows, to-wit:

193 This Deed, Made this twelfth day of May in the year of our Lord one thousand nine hundred and two between Emma F. Nutter of the County of Delta, and state of Colorado, of the first part, and Alexander Burrell of the County of Lewis & Clarke, and State of Montana of the second part:

Witnesseth, That the said party of the first part, for and in consideration of the sum of Nine Hundred Dollars, to the said party of the first part in hand paid by the said part.. of the second part, the receipt hereof is hereby confessed and acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lot or parcel of land, situate, lying and being in the County of Delta, and State of Colorado, to-wit:

South Half of the Northeast Quarter of Section [Twleve], in Township Thirteen South of Range Ninety One West of the Sixth P. M. containing Eighty acres.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances.

To Have And To Hold The said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said Emma F. Nutter party of the first part, for herself, her
194 heirs, executors and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents she has good right, full power and lawful authority to grant, bargain, sell and convey the same, in manner and form aforesaid, and that the same are free and clear from all former and other liens, taxes, assessments and incumbrances of whatever kind or nature soever; and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, by, through or under the said party of the first part the said party of the first part shall and will Warrant and Forever Defend.

In Witness Whereof, The said party of the first part has hereunto set her hand and seal the day and year above written.

(Seal) EMMA F. NUTTER,

Signed, Sealed and Delivered in Presence of:
Millard Fairlamb.

State of Colorado,
Delta County—ss.

I, Millard Fairlamb, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Emma F. Nutter personally known to me to be the person whose name is subscribed to the annexed Deed, appeared before me this day in person, and acknowledged that she signed, sealed and delivered the said instrument of writing as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this thirteenth
195 day of May, A. D. 1902.

My commission expires February 12th, 1906.

(Notarial Seal) MILLARD FAIRLAMB,
Notary Public.

(Endorsed on back of Deed)

No. 22230

Warranty Deed
from
Emma F. Nutter
to
Alexander Burrell

State of Colorado,
County of Delta—ss.

This Warranty Deed was filed for record at 8:50 o'clock A. M. Oct. 29, 1902 and is duly recorded in Book 53 Page No. 217.

H. K. FERGUSON, Recorder.
By M. Walker, Deputy.

Fees, $.....

State of Colorado,
County of Delta.

I, H. K. Gibbs, County Clerk and Recorder in and for said County and State, do hereby certify that the within and foregoing is a full, true and correct copy of Warranty Deed from Emma F. Nutter to Alexander Burrell No. 22230 as it appears of record in my office in Book 53 at page 217.

Witness my hand and official seal at Delta, Colo., this 18th day of July 1915. Issued to H. B. Tedrow, U. S. Atty.

(sgd) H. K. GIBBS,
County Clerk and Recorder, Delta County, Colo.

....., Deputy.

No. 214 Fee $1.00

(10¢ Internal Revenue
stamp affixed)

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196 Exhibit C is similar to Exhibit B as to general form, and conveys from Ella Davis to Alexander Burrell the following lands:

Southeast quarter of Section Twelve, in Township Thirteen South of Range Ninety One West of the Sixth P. M. containing one hundred and sixty acres more or less, according to government survey.

This deed is dated May 12, 1902, acknowledged May 13, 1902 and recorded on October 29, 1902, in Book 53, page 216 of the records of Delta County, Colorado.

Exhibit D is similar to Exhibit B as to general form, and conveys from Charles P. Nutter to Alexander Burrelll the following lands:

Northeast quarter of Southwest quarter of Section Twelve, in Township thirteen south of Range ninety-one West of the Sixth P. M. containing forty acres according to government survey.

This deed is dated May 12, 1902, acknowledged May 19th, 1902 and recorded on October 29, 1902, in Book 53, page 215 of the records of Delta County, Colorado.

Exhibit E is similar to Exhibit B as to general form, and conveys from Daniel S. Baldwin to Alexander Burrell the following lands:

The East half of the Southwest quarter of Section seven and Northeast quarter of Northwest quarter of Section Eighteen in Township Thirteen South of Range ninety West of the Sixth P. M. containing one hundred and twenty acres according to the government survey thereof.

This deed is dated May 12, 1902, acknowledged May 12, 1902 and recorded on September 15, 1902, in Book 154, page 285 of the records of Gunnison County, Colorado.

197 Exhibit F is similar to Exhibit B as to general form, and conveys from Stella M. Fairlamb to Alexander Burrell the following lands:

West half of North West quarter of Section Eighteen and West half of South West quarter of Section seven in Township Thirteen South of Range Ninety West of the Sixth P. M. containing one hundred and forty eight acres and thirty four hundreths of an acre, according to the goverment survey thereof.

This deed is dated May 12th, 1902, acknowledged May 13, 1902 and recorded on October 18, 1902, in Book 154, page 299 of the records of Gunnison County, Colorado.

Exhibit G is similar to Exhibit B as to general form, and conveys from Mrs. Edith Cartwright to Alexander Burrell the following lands:

The Southwest Quarter of Section One in Township Thirteen, South of Range Ninety-one West of the Sixth P. M. containing one Hundred and sixty acres.

This deed is dated May 12th, 1902, acknowledged July 12, 1902 and recorded on October 29, 1902, in Book 53, page 213 of the records of Delta County, Colorado.

Exhibit H is similar to Exhibit B as to general form, and conveys from Maggie E. Holmes to Alexander Burrell the following lands:

Northwest quarter of Section Twelve in Township Thirteen South of Range Ninety One, West of the Sixth P. M. Containing One-Hundred and Sixty acres.

This deed is dated May 6, 1902, acknowledged May 6, 1902 and recorded on October 29, 1902, in Book 53, page 218 of the records of Delta County, Colorado.

198 Exhibit I is similar to Exhibit B in general form, and conveys from John Davis to Alexander Burrell the following lands:

Northeast Quarter of Section Thirteen in Township, Thirteen, South of Range Ninety-one, West of the Sixth P. M. containing one hundred and sixty acres according to governmen survey.

This deed is dated May 12, 1902, acknowledged May 13, 1902 and recorded October 29, 1902, in Book 53, page 214 of the records of Delta County, Colorado.

Exhibit J is similar to Exhibit B in general form, and conveys from Anna Nutter to Alexander Burrell the following lands:

Southwest quarter of Southeast quarter of Section seven and Northwest quarter of Northeast quarter of Section eighteen in Township Thirteen South of Range Ninety West of the Sixth P. M. containing eighty acres according to government survey.

This deed is dated May 13, 1902, acknowledged May 13, 1902 and recorded October 18, 1902, in Book 154, page 300 of the records of Gunnison County, Colorado.

Exhibit K is similar to Exhibit B in general form, and conveys from Alexander Burrell and Abbie M. Burrell to Albert L. Smith the following lands: .

Southwest quarter of southeast quarter, of Section seven (7) and Northwest quarter of Northeast quarter of Section eighteen (18) in Township Thirteen (13) south of range ninety (90) West of the Sixth Principal Meridian, of the State of Colorado, containing eighty acres according to Government Survey; East half of southwest quarter of Section seven (7) and Northeast quarter of Northwest quarter of Section eighteen (18) in Township thirteen (13) South of Range ninety (90) West of the Sixth Principal Meridian of the State of Colorado, containing one hundred and twenty acres (120) according to the Government Survey thereof; Lots numbered three (3) and four (4) of Section (7) and the Lots
199 numbered one (1) and two (2) of Section eighteen (18) in township thirteen (13) South of Range Ninety (90) West of the Sixth Principal Meridian in the State of Colorado, being the same parcel of land conveyed to the said Alexander Burrell by Stella M. Fairlamb, by deed dated the twelfth day of May, 1902, recorded in Book 154 of Deeds of the County of Gunnison, State of Colorado, page 299, described as follows: West half of northwest quarter of Section eighteen (18) and West half of southwest quarter of Section seven (7) in Township thirteen (13) South of Range ninety (90) west of the Sixth Principal Meridian, in the State of Colorado, containing one hundred and forty-eight (148) acres and thirty-four hundreths of an acre, according to Government survey thereof.

This deed is dated November 15, 1902, acknowleged November 15, 1902 and recorded December 1, 1902, in Book 154, page 317 of the records of Gunnison County, Colorado.

Exhibit L is similar to Exhibit B in general form, and conveys from Alexander Burrell and Abbie M. Burrell to Albert L. Smith the following lands:

The Southwest Quarter of Section One (1), in Township Thirteen (13) South of Range Ninetyone (91) West of the Sixth Principal Meridian of the State of Colorado, containing one hundred and sixty (160) acres; Northwest Quarter of Section Thirteen (13) in Township Thirteen (13) South of Range Nine on (91) West of Sixth Principal Meridian of the State of Colorado, containing one hundred and sixty (160) acres; according to government survey; Northeast quarter of Southwest quarter of section Twelve (12) in Township Thirteen (13) South, of Range Ninety-one (91) West of the

Sixth Principal Meridian of the State of Colorado, containing forty (40) acres according to government survey; Southeast Quarter of Section twelve (12) in Township Thirteen (13) South of Range Ninety-one (91) West of the Sixth Principal Meridian of the State of Colorado, containing one hundred and sixty (160) acres, more or less, according to
200 the government South half of the Northeast Quarter of Section Twelve (12) in Township Thirteen (13) South of Range Ninety-one (91) West of the Sixth Principal Meridian of the State of Colorado, containing eighty (80) acres; Northwest quarter of section Twelve (12) in Township Thirteen (13) South of Range Ninety-one (91) West of the Sixth Principal Meridian of the State of Colorado, containing one hundred and sixty (160) acres.

This deed is dated November 15, 1902, acknowledged November 15, 1902 and recorded December 1, 1902, in Book 53, page 276 of the records of Delta County, Colorado.

Exhibit M is similar to Exhibit B in general form, and conveys from Albert L. Smith to Philip L. Foster the following lands:

Southwest quarter of the Southeast Quarter of Section seven (7), and Northwest quarter of Northeast quarter of Section eighteen (18) in Township thirteen (13) south of range ninety (90) West of the Sixth Principal Meridian of the State of Colorado, containing eighty acres according to Government survey; east half of southwest quarter of Section seven (7) and Northeast quarter of Northwest quarter of Section eighteen (18) in Township thirteen (13) South of Range Ninety (90) West of the Sixth Principal Meridian of the State of Colorado, containing one hundred and twenty acres (120) according to the Government survey thereof;

Lots numbered three (3) and four (4) of Section seven (7) and the lots numbered one (1) and (2) of Section eighteen (18) in Township thirteen (13) South of Range ninety (90) west of the Sixth Principal Meridian of the State of Colorado, being the same parcel of land conveyed to the said Alexander Burrell by Stella M. Fairlamb by deed dated the twelfth day of May, 1902, recorded in book 154 of Deeds of the County of Gunnison, State of Colorado, page 299, described as follows:

West half of Northwest quarter of Section eighteen (18) and West half of Southwest quarter of Section seven (7) in Township Thirteen (13) South of Range Ninety (90)
201 West of the Sixth principal Meridian, in the State of Colorado, containing one hundred and forty-eight (148)

acres and thirty-four hundredths of an acre, according to the Government Survey thereof.

This deed is dated March 1, 1904, acknowledged March 1, 1904, and recorded April 19, 1906, in Book 169, page 240 of the records of Gunnison County, Colorado.

Exhibit N is similar to Exhibit B in general form, and conveys from Albert L. Smith to Philip L. Foster the following lands;

The South-west quarter of Section one (1) in Township thirteen (13) South of range ninety-one (91) West of the Sixth Principal Meridian of the State of Colorado, containing one-Hundred and sixty (160) acres;

North-east quarter of South-west quarter of section twelve (12) in township thirteen (13) South, of Range ninety-one (91) West of the Sixth Principal Meridian of the State of Colorado containing forty (40) acres according to Government survey;

South-east quarter of section twelve (12) in township thirteen (13) South of range ninety-one (91) West of the Sixth Principal Meridian of the State of Colorado, containing one hundred and sixty (160) acres, more or less, according to the Government Survey;

South half of the North-east quarter of section twelve (12) in township thirteen (13) South, of range ninety-one (91) West of the Sixth Principal Meridian of the State of Colorado containing eighty (80) acres;

Northwest quarter of section twelve (12) in township thirteen (13) South of range ninety-one (91) West of the sixth Principal Meridian of the State of Colorado, containing one hundred and sixty (160) acres.

This deed is dated March 1, 1904, ackowledged March 1, 1904, and recorded April 21, 1906 in Book 62, page 284 of the records of Delta County, Colorado.

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202 (Defendant's Evidence.)

PHILIP L. FOSTER testified for the defendant:

I am one of the defendants in this case and have already testified by deposition an behalf of the plaintiff. I have tified in my deposition that I hold a general power of attorney from the defendant, Exploration Company, Limited, dated September 23, 1904, and my connection with the de-

fendant company in so far as its activities in the United States are concerned commenced at that time. Aside from the interest which the Exploration Company has in the coal lands involved in this case, it has never owned or dealt in any other coal lands in the United States. The Exploration Company has operated and has had interests in nearly every country in the world. It has never owned any properties in the United States in its own name, nor has it ever taken title to any interests in the United States in its own name. The Exploration Company is interested in the stock of the Tomboy Gold Mines Company at Telluride, but it has never owned directly for itself the Tomboy property. In no instance has the Exploration Company, Limited, held title in its own name to properties in the United States. The titles to the coal lands involved in this case were placed in my name as the representative in this country of the Exploration Company so as to enable me to deal with them should it be necessary to act, solely to expedite matters, and that possibly they might desire me to dispose of the lands to other companies or to subsidiary companies of the Exploration Company. There are other cases where titles to properties in which the Exploration Company, Limited, was interested were placed in my name. There are mining properties in Alaska adjoining the Treadwell, still in my name. That was done about the same time the titles to the lands in suit were transferred to me. I have been the American representative of the Exploration Company since September, 1904, under the power
203 of attorney which is in evidence. The titles to the lands in question were not placed in my name for the purpose of concealing from the government or any other person the interest of the Exploration Company in these lands. I was asked to advertise the fact that the company owned them. I was asked to approach various people who might become purchasers of the property and I did so with the object of disposing of these lands. I know Mr. M. D. McEniry and heard his testimony. I remember the circumstance of meeting him. [Mc.] McEniry called on me and asked me if I was the Foster in whose name the title to these coal lands was vested. He asked me if I held this property as my own or for some one else. I told him I held this property in trust for the Exploration Company. I being their representative in America. Mr McEniry asked me if he could count on further information from me and I said I would be very glad indeed to give him all the facts as I knew them, hoping it would expedite the case. Mr. McEniry asked me then if I would answer a list of questions he would send me from Washington and I said I could not tell about answering any

questions until I consulted my legal adviser. He did not send me any further questions and the matter was closed. I am quite sure that I told him I held the title for the Exploration Company. When I testified in redirect examination on deposition in answer to one question, "Have you ever placed in the hands of any official of the government of the United States of America any written instrument in which you declare that you hold the title to these lands in trust for the Exploration Company, Limited?

A. No, but I volunteered to, "I meant that I was perfectly willing to furnish anybody with the only document that there was, which was my declaration made yearly that I held this property in trust for the Exploration Company,
204 which document is handed to the auditors, the public auditors of the Company, for the purpose of annual audit. No document has ever been made regarding any trust, beyond that statement. This document which I execute yearly to the company is simply a letter which states that the lands described as the Colorado coal lands are held by me in trust for them. This letter also embraces other properties which I hold on behalf of the company, such as the property in Alaska, called the Mineral Queen, and any shares in American Companies held by me on account of the Exploration Company. This letter is simply a general report

On Cross-Examination, the witness testified as follows:

This report which I speak of is a private report which I make myself and mail to the company in London. It is not placed on any public record in the United States, nor published in any newspaper or given out to the world generally. I have never filed in Delta of Hunnison counties, Colorado, any declaration of the interest under which I hold these lands in question. I told Mr. McEniry specifically at the conference in New York in March, 1909 that I held the lands in trust for the benefit of the Exploration Company, Limited. I volunteered this information.

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205 (Recital that Testimony of Plaintiff was introduced over Defendants Objection, etc.)

All the testimony of the plaintiff was introduced over the objection of the defendants made at the time of taking such testimony, on the ground that it appears upon the face of the bill of complaint that the United States patent for each and every of the tracts of land specified and enumerated in the said bill, and to cancel and annul which said bill is brought, were issued more than six years prior to the date whereon

said suit was brought, and that the respective dates of the issuance of such patents, and each of them, were and are more than six years prior to the date whereon this suit was brought, and, therefore, under and by virtue of the Statute of the United States in such case made and provided, this suit, with respect to each and every of said tracts of land, is barred by the lapse of time.

The foregoing statement of evidence contains the substance of all of the testimony given in this case.

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206 (Stipulation for Approval of Statement of Evidence.)

It is stipulated by and between the parties to this cause, through their respective solicitors, that the foregoing statement of evidence may be approved by the Court or Judge, as the statement of evidence to be used for the purposes of defendants' appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States", and the complainant (United States of America) hereby expressly waives its right to have the statement of the evidence first lodged in the Clerk's office for its examination, and further waives its right to the ten days' notice of the time and place when and where the defendants will ask the Court or Judge to approve the same, as provided in and by said Rule 75.

HARRY B. TEDROW,
U. S. Attorney.

FRANK HALL,
Special Asst. to the Atty. Genl.
Solicitors for Complainant.

VAILE, McALLISTER & VAILE,
GEORGE E. TRALLES,
Solicitors for defendants, Exploration Company, Limited and Philip L. Foster.

(Approval of Statement of Evidence by District Judge.)

Submitted to and approved by me this 8th day of February, A. D. 1916, as the statement of evidence to be used for the purpose of appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit, under Rule 75 of

the "Rules of Practice for the Courts of Equity of the United States", from the decree herein.

JACOB TRIEBER,
U. S. District Judge.

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207 Upon agreement of all the parties the foregoing statement of evidence is submitted to and approved by me in open court, at Denver, Colorado, this 24th day of February, A. D. 1916, as the statement of evidence to be used for the purpose of appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit, under Rule 75, of the "Rules of Practice for the Courts of Equity of the United States", from the decree herein.

By the Court:

ROBT. E. LEWIS,
U. S. District Judge.

Endorsed: Statement of Evidence. Filed in the District Court on February 24, 1916.

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208 Petition for Appeal by Exploration Company, and Philip L. Foster.

The defendant, Exploration Company, Limited, and Philip L. Foster, conceiving themselves aggrieved by that certain final decree made and entered on the 25th day of August, 1915, in the above entitled cause, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in their assignment of errors which is filed herewith. And they pray that the appeal may be allowed, and a transcript of those portions of the record as may be duly settled under Rule 75 of the "Rules of Practice for the Courts of equity of the United States", duly authenticated, may be sent to the said United States circuit court of appeals for the eighth circuit.

EXPLORATION COMPANY, LIMITED,
PHILIP L. FOSTER,
By Joel F. Vaile,
Henry McAllister, Jr.
William N. Vaile,
George E. Tralles,
Solicitors for said defendants.

209

Endorsed: Filed in the District Court on Feb. 24, 1916.

Assignment of Errors by the Defendants, Exploration Company, Limited, and Philip L. Foster.

Comes now Exploration Company, Limited, and Philip L. Foster, defendants herein, and file this, their assignment of errors, upon which they will rely upon their appeal from the final decree herein, heretofore entered by said District Court.

The said District Court erred in making and entering said decree, and in the proceedings in said cause prior to
210 final decree, in the following particulars, to-wit:

1. The said court erred in refusing to enter a decree in favor of the defendants, Exploration Company, Limited and Philip L. Foster, dismissing the bill of complaint as to them.

2. The said court erred in refusing to find and decree that the evidence herein did not support or sustain the bill of complaint or justify any decree thereon in favor of the plaintiff and against the defendants, or either of them.

3. The said court erred in making and entering the decree herein in favor of the plaintiff and against the defendants.

4. The said court erred in entering the decree herein against the defendants, and in refusing to enter a decree herein in favor of the defendants dismissing the bill of complaint, for the reason that the bill of complaint charged the defendant, Exploration Company, Limited, with being a party to the alleged original unlawful conspiracy to secure title to the lands in question in this suit, and with being one of the conspirators at whose instance the respective entries in question were made and patents thereon procured, and with being a party to all the alleged unlawful acts set forth in the bill of complaint; whereas the evidence wholly failed to sustain such allegations, or to justify a decree in favor of the plaintiff based thereon.

5. The said court erred in entering the decree herein
211 against the defendants, in that the bill of complaint was not sustained by evidence that the defendant, Exploration Company, Limited, or any of its officers, agents or employees, or that the defendant, Philip L. Foster, was a party to the conspiracy alleged in the bill, or that the several entries described in the bill, or any of the said entries, were made for the use or benefit of the defendant, Exploration Company, Limited.

6. The said court erred in entering the decree herein against the defendants, in that the bill of complaint was not

sustained by sufficient evidence that the deeds from Albert L. Smith to the defendant, Philip L. Foster, or either of said deeds were fraudulent or made to deceive the plaintiff.

7. The said court erred in entering the decree herein against the defendants, in that there was no evidence that the acts of the said entrymen, or any of them, in making and perfecting their several entries, or in conveying the title to the lands embraced in said entries, or any of them, were done in behalf, or for the use or benefit of, the defendant, Exploration Company, Limited.

8. The said court erred in making and entering the decree herein cancelling the United States patents to the several entrymen, or either of them, for the respective tracts of land covered by their respective entries and patents, and
212 in cancelling and annulling all or any of the deeds heretofore executed or delivered by either of said parties to Alexander Burrell, or by Alexander Burrell to Albert L. Smith, or by Albert L. Smith to the defendant, Philip L. Foster.

9. The said court erred in making and entering the decree herein in favor of the plaintiff and in refusing to enter a decree dismissing the bill of complaint, for the reason that it appeared upon the face of the bill of complaint and also from the testimony that the respective dates of the issuance of the patents and each of them, to cancel and annul which this suit was brought, were in September or October, 1902, and more than six years prior to the date whereon this suit was brought, and therefore under and by virtue of the statutes of the United States in such case made and provided, this suit, with respect to each and every of such tracts of land, was and is barred by the lapse of time and each and every of such patents were thereby forever validated and confirmed even though originally void or voidable (26 Stat. at Large, pp. 1095, 1099; 29 Stat. at Large, p. 42).

10. The said court erred in overruling the demurrer of the defendants to the bill of complaint, for the reason that it appeared upon the face of the bill that such suit was barred by the lapse of time because of the facts and the statutes mentioned in the last preceding assignment numbered 9.

213 11. The said court erred in making and entering the decree herein in favor of the plaintiff in that the evidence conclusively established, and the court so found, that the defendants, or any of them, did not actively conceal the facts, or any of them, out of which the alleged frauds arose,

and were not guilty of any affirmative acts of fraud during the period of alleged concealment or during the period of six years subsequent to the dates of the issuance of said patents, and that the allegations of the bill in this respect were not sustained by the testimony.

12. The said court erred in making and entering the decree herein in favor of the plaintiff in that the evidence conclusively established, and the court so found, that the defendants or any one for them did not conceal, or attempt to conceal, the alleged original fraud from the knowledge of the plaintiff, by subsequent and affirmative acts of fraud, or otherwise, and that the allegations of the bill in this respect were not sustained by the testimony.

13. The said court erred in making and entering the decree herein in favor of the plaintiff in that it was established by the evidence of the plaintiff that there were two separate corporations known as Exploration Company, Limited, and that the one referred to and described in the bill of complaint and made a party defendant to this action was not the
214 one which now claims the beneficial ownership to the lands in question and for which the defendant, Philip L. Foster, holds the legal title in trust, and there was, therefore, a lack of necessary parties to this action, and the decree of said court did not attempt to save the rights of such absent party, but on the contrary expressly sought to affect and adjudicate the same.

14. The said court erred in making and entering the decree herein in favor of the plaintiff in that it was established by the evidence of the plaintiff that a former defendant in this action, Alexander Burrell, has a substantial interest in, and claim to, the lands involved in this action, and although there is a final judgment and decree by the said court in this action in favor of the said Alexander Burrell and against the plaintiff, the final decree of the said court of August 25, 1915, did not attempt to save the rights of said Alexander Burrell but on the contrary expressly sought to adjudicate the same against the said Alexander Burrell in favor of the plaintiff.

15. The said court erred in what is denominated its findings of facts incorporated in its opinion, in that there was no sufficient evidence to sustain the finding that the defendant, Philip L. Foster, holds the legal title to the lands involved in this case, in secret trust for the defendant, Exploration Company, Limited, or that the legal title held by the de-
215 fendant, Philip L. Foster, for the benefit of the defendant, Exploration Company, Limited, was concealed.

16. The said court erred in what is denominated its findings of facts incorporated in its opinion, in that there was no evidence sufficient to sustain the finding that all fees, as well as the purchase money, for the lands entered, were furnished by the defendant, Exploration Company, Limited.

17. The said court erred in what is denominated its findings of facts incorporated in its opinion, in that there was no sufficient evidence to sustain the finding that no facts became known to the plaintiff until 1909 which could arouse the suspicion of one exercising reasonable diligence, that the patents to the lands in question had been obtained in the manner, and under the circumstances, disclosed by the evidence in this case.

Wherefore, Exploration Company, Limited, and Philip L. Foster, defendants appealing pray that the decree entered as aforesaid against them may be wholly set aside, annulled and reversed and for naught held; that the case between the plaintiff and these defendants be remanded to the said District Court with directions to enter a decree in favor of these defendants and dismissing the bill of complaint; and for such other, further and different relief to which they may in equity and good conscience be entitled.

EXPLORATION COMPANY, LIMITED,
216 PHILIP L. FOSTER,

By Joel F. Vaile,
Henry McAllister, Jr.,
William N. Vaile,
George E. Tralles,
Their solicitors.

Endorsed: Filed in the District Court on Feb. 14, 1916.

(Order Allowing Appeal.)

Sixty-third Day, November Term, Thursday, February 24th, A. D. 1916.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the second day of November, A. D. 1915.

Bill to cancel patents and for other relief.

The United States of America,
5663. vs. In Chancery.
Exploration Company, Limited, et al.

Now on this 24th day of February, A. D. 1916, the same being one of the regular juridical days of the November, A.

D. 1915, term of said court, come the defendants, Exploration Company, Limited, and Philip L. Foster, and present their petition in writing for an appeal from that certain decree made and entered herein on the 25th day of Au-
217 gust, 1915, to the United States Circuit Court of Appeals for the Eighth Circuit, together with an assignment of errors accompanying the same; which petition upon consideration of the court, is hereby granted and allowed; and the court hereby allows an appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit; and the amount of the bond upon such appeal, duly conditioned to operate as a supersedeas, is hereby fixed at the sum of one thousand dollars ($1000.).

(Supersedeas Bond.)

United States of America,
District of Colorado—ss.

Know All Men By These Presents, that we, Exploration Company, Limited, a corporation, and Philip L. Foster, as principals, and National Surety Company, as surety, are held and firmly bound unto the United States of America, in the full and just sum of one thousand dollars ($1000.00) to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs,
218 executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 24" day of February, A. D. 1916.

Whereas, lately at the May term, A. D. 1915, of the District Court of the United States for the District of Colorado, sitting at Denver, in a suit pending in said court between the United States of America, plaintiff, and Exploration Company, Limited, and Philip L. Foster, defendants, a final decree was rendered against the defendants, Exploration Company, Limited, and Philip L. Foster, and the said defendants, Exploration Company, Limited and Philip L. Foster, having prayed for and been allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment and decree in the aforesaid suit; and a citation directed to the said the United States of America citing and admonishing it to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said defendants, Exploration Company, Limited and

Philip L. Foster, shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

219 EXPLORATION COMPANY,
LIMITED,
By Joel F. Vaile
Henry McAllister Jr.
William N. Vaile
George E. Tralles
Its Attorneys.

PHILIP L. FOSTER,
By Joel F. Vaile
Henry McAlister Jr.
William N. Vaile
George E. Tralles
His Attorneys.

(Corporate Seal of) (National Surety Co.) NATIONAL SURETY COMPANY,
By Ralph W. Smith
Its Attorney in fact.

Approved February 24", 1916. Robt. E. Lewis, Judge.

Endorsed: Filed in the District Court on Feb. 24, 1916.

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220 Notice of Election by Defendants, Exploration Company and Philip L. Foster, as to Printing Record.

The Exploration Company, Limited and Philip L. Foster, being the appellants in the above entitled cause from a decree of said court to the United States Circuit Court of Appeals for the Eighth Circuit, hereby give notice that they elect to take and file in the said Appellate Court, to be printed under the supervision of its clerk, under its rules, a transcript of such portions of the record as may be duly settled under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States", duly authenticated.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
GEORGE E. TRALLES,
Solicitors for defendants.

Endorsed: Filed in the District Court on Feb. 24, 1916.

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221 Praecipe for Transcript on Appeal by Defendants, Exploration Company, Limited, A Corporation, and Philip L. Foster.

To Charles W. Bishop, Esquire, Clerk of said Court:

Please prepare and duly authenticate for the appeal of the defendants, Exploration Company, Limited, a corporation and Philip L. Foster, to the United States Circuit Court of Appeals for the Eighth Circuit from the decree in the above entitled suit, entered August 25, 1915, a transcript incorporating the following portions of the record therein and none other.

1. Bill of complaint;

2. Joint and several demurrer of Exploration Company, Limited, and Philip L. Foster, defendants, to the bill of complaint; filed on or about May 17, 1911;

222 3. Demurrer of Alexander Burrell to the bill of complaint, filed June 2, 1911;

4. Order sustaining demurrers of Exploration Company, Limited, Philip L. Foster and Alexander Burrell to the bill of complaint and dismissing the bill of complaint; entered October 13, 1911;

5. Decree dismissing the bill of complaint, entered November 13, 1911;

6. Mandate from United States Circuit Court of Appeals for the Eighth Circuit, reversing the decree of the Circuit (now District) court for the District of Colorado, and allowing [alpellees], Exploration Company, Limited and Philip L. Foster to plead to the bill.

7. Order entered by this court, upon such mandate, overruling the demurrer of defendants, Exploration Company, Limited, and Philip L. Foster and directing the said defendants to answer the bill of complaint;

8. The joint and several answer of the defendants Exploration Company, Limited and said Philip L. Foster, to the bill of complaint;

~~9. The replication of the plaintiff to said answer;~~

10. Trial orders entered July 20, 21, 1915.

11. Court's opinion and "findings of fact" etc. (as
223 per its caption) filed August 9, 1915.

12. Final decree entered August 25, 1915.

13. The statement of the evidence as finally approved by the court or the judge thereof;

14. The petition of Exploration Company, Limited, and Philip L. Foster for their said appeal;

15. The assignments of errors for such appeal.

16. The orders of the court or judge allowing such appeal;

17. Their bond on appeal;

18. The citation issued on such appeal showing service thereof;

19. Notice of election by Exploration Company, Limited and Philip L. Foster, regarding printing of record, etc.

20. Defendant's praecipe for transcript on appeal.

Dated at Denver, Colorado, February 24, 1916.

JOEL F. VAILE,
HENRY McALLISTER, Jr.
WILLIAM N. VAILE,
GEORGE E. TRALLES,
Attorneys for said defendants.

Due service of a copy of the foregoing praecipe, at Denver, Colorado, this 24th day of February, 1916, upon the plaintiff and appellee, United States of America, is hereby
224 acknowledged.

HARRY B. TEDROW,
United States Attorney.

FRANK HALL,
Special Agent to the Attorney General.

Endorsed: Filed in the District Court on Feb. 24, 1916.

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225 (Citation.)

United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America: To the United States of America—Greeting:

You are hereby cited and admonished to be and appear in The United States Circuit Court of Appeals for the Eighth

Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by The District Court of the United States for the District of Colorado, sitting at Denver, wherein Exploration Company, Limited, and Philip L. Foster, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Robert E. Lewis, Judge of the district court of the United States for the district of Colorado, at Denver, in said district, this 24th day of February, A. D. 1916.

ROBT. E. LEWIS,
Judge.

Service of the within citation is hereby accepted for and on behalf of appellee, The United States of America, this 24th day of February, A. D. 1916.

HARRY B. TEDROW,
U. S. Attorney.
Solicitor for Appellee.

Endorsed: Filed in the District Court on Feb. 24, 1916.

225a (Clerk's Certificate to Transcript.)

United States of America,
District of Colorado—ss.

I, Charles W. Bishop, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to two hundred and twenty-four (224), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings, and other matters set forth in the praecipe filed herein, together with a true copy of such praecipe, heretofore filed or entered of record in said court and in a certain cause lately in said court pending, wherein The United States of America was plaintiff and Exploration Company, Limited, R. T. Bayliss, Alexander Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith, a copy of opinion of Honorable Jacob Trieber, heretofore handed down and filed in said cause.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this tenth day of March, A. D. 1916.

Seal
U. S. Dist. Court
Dist. of Colo.

CHARLES W. BISHOP,
Clerk.

Documentary
Stamp
Canceled
Mar. 16, 1916.

Filed Mar. 16, 1916, John D. Jordan, Clerk.

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226 Findings of Fact and Opinion of District Court.

United States of America, Plaintiff,
vs.
The Exploration Company, Limited, and Philip L. Foster, Defendant.

This is an action by the government to cancel and set aside patents issued for a number of tracts of land obtained under the coal land statutes, on the ground that they were obtained by fraud. The material allegations of the complaint are set out fully in the opinion of the U. S. Circuit Court of Appeals, when this case was in that court on appeal from a decree sustaining the demurrer to the complaint, (203 Fed. 387) and need not be set out here.

The answer of the defendants denies all the material allegations, but no claim is made that the defendants are bona fide purchasers. There was very little conflict in the evidence, and the court finds the facts to be as follows:

The defendant, which will be referred to herein as the Exploration Company, is a corporation existing under
227 the laws of Great Britain, authorized by its articles of incorporation, to purchase, own and operate mines, and purchase and own shares of stock in mines in all parts of the world. That it was the owner of mines and mining lands in different parts of the world, and also of the shares of corporations engaged in mining in the United States and other countries. In 1901, and for several years thereafter, it had a representative in the United States by the name of Charles A. Molson, to whom it had executed a general power of attorney to represent it in all matters in the United States.

This agent resided at Salt Lake City, Utah. The Exploration company, being desirous of acquiring coal lands in the state of Colorado, which were a part of the public domain of the United States, and being unable to do so, by reason of the fact that it was a foreign corporation, and besides, desiring more of these coal lands than it could, even if it were a domestic corporation, obtain under the laws of the United States, it conceived and carried into effect the following scheme for the purpose of acquiring them:

Mr. Molson employed one Henry Burrell to obtain the title to these lands. Burrell employed other agents, who were sent to residents of the State of Colorado, who, under the laws, could acquire public coal lands from the United States, and induced them to make entries of such lands as were pointed
out to them by these agents of the Exploration Com-
228 pany, and which were supposed to contain valuable veins of coal. A large number of such entries were made on such lands, which were lying in the counties of Gunnison and Delta, the parties filing declaratory statements, as required by law. Many of these lands thus filed on were abandoned and no patents applied, for, as upon investigation, they were found not to contain sufficient coal to justify their purchase, but the filings on the lands in controversy were paid for and patents therefor secured. Henry Burrell was a witness in most, if not all of these entries. The parties who made these entries were promised the sum of twenty-five dollars for their services. All fees, as well as the purchase money, were to be paid by Burrell with money furnished by the Exploration Company. As soon as the final proofs were made and the money paid by the agent of the Exploration Company, to the respective officers of the Land Offices within whose jurisdiction the lands were situated, the entrymen and women executed deeds of conveyance for their respective tracts of land and delivered them to Henry Burrell. These deeds Henry Burrell caused to be made to Alexander Burrell, his brother. Some time later Alexander Burrell conveyed these lands to one Albert L. Smith, a banker in Helena, Montana, without any consideration except the promise of Smith to hold them in trust for and to convey
them to any person designated by the agent of the Ex-
229 ploration Company. Charles A. Molson, the agent, having died, the Exploration Company appointed the defendant Philip L. Foster as its general agent in the United States, with a power of attorney to act generally in its behalf. Thereupon Albert L. Smith, at the request of the defendant's agents, conveyed these lands to Mr. Foster without any other consideration. The legal title has ever since been in

Mr. Foster, who holds it in secret trust for the Exploration Company.

The patents to these lands were issued by the government in September, 1902, but the fact that they were secured by false affidavits, and not for the benefit of the entrymen and women, but for the sole benefit of the Exploration Company, and that the purchase money paid to the government, was the Exploration Company's money, was kept secret, and did not become known to any of the officers of the government, nor did any facts become known to them which could arouse the suspicion of one exercising reasonable diligence that the patents to these lands had been obtained by false affidavits and for the benefit of the defendant Exploration Company, until 1909, more than six years after the patents had been issued, and then it only became known to the officers of the government by reason of the fact that a Utah corporation had acquired a great many of the public coal lands in the same manner as these lands were obtained, and that being discovered in 1909, the Secretary of the Interior di-
230 rected in that year an examination of all coal entries made in the states of Utah and Colorado. When these investigations were made, the facts were for the first time discovered as hereinbefore recited. There was nothing in the records, or on file in the General Land Office of the United States or the Department of the Interior which could possibly have aroused a suspicion that these lands had been obtained for the benefit of the Exploration Company, until the reports of the special agents of the General Land Office were made the latter part of 1909. As soon as the facts were ascertained, the Secretary of the Interior transmitted them to the Department of Justice with the request to institute suits, to set aside the patents, and this suit was filed on March 3, 1911, within several months less than two years after the discovery of the alleged fraudulent acts.

The court also finds that the defendants did not actively conceal the facts which constitute the frauds in this case, by enjoining silence on the entrymen and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the government but were only guilty of a passive concealment. When the investigation was made by the special agents of the General Land Office, in 1909, in relation to these
231 entries, the patentees as well as the company's agents stated the facts truthfully, but until that time the fact that the entries were all made for the benefit of the company and that the legal title held by the defendant Foster was for the benefit of the Exploration Company, was concealed; nor

were there any facts or circumstances within the knowledge of any official of the government, prior to the investigation in 1909, which could arouse even a bare suspicion that these entries were made in the manner and for the benefit of the Exploration Company, as hereinbefore set out.

Opinion.

Counsel for the defendants concede that the decision of the Circuit Court of Appeals in this case, is [conclusive,] so far as this court is concerned, that the Act of March 2, 1896, Chap. 39, 29 Stat. 42, does not bar an action to set aside a patent for public lands, on the ground of fraud, after the expiration of six years, if the parties who perperated the frauds and their beneficiaries have concealed it for the period of limitation, and the government has not been guilty of any want of diligence or care to discover it if the action is brought within proper time after the discovery of the fraud. But it is contended that as the only question before the court on that appeal was the sufficiency of the complaint, to which a demurrer had been sustained by the District Court, (190 Fed. 405) the decision must be limited to the facts as
232 they were alleged in the complaint; that the complaint charged in specific terms that the ignorance of the fraud had been caused by affirmative acts of concealment of the guilty parties, while at the hearing the evidence shows, and the court so finds, that the parties were not guilty of any active or affirmative concealment of their acts which are alleged to constitute the fraud for which the patents should be set aside, but were only guilty of passive concealment.

The authorities upon which counsel for both sides rely to sustain their respective contentions are quite numerous, many of them being decisions of the Circuit and District Courts of the United States, as well as of the highest courts of a number of states.

In view of the fact that in the opinion of this court this question has been conclusively determined by numerous decisions of the Supreme Court of the United States, the court will confine itself to a review of the decisions of that court only.

The English courts had long ago uniformly held that where a person has been injured by the fraud of another, and the facts constituting such fraud do not come to the knowledge of the person injured until some time afterward, the statute of limitations will not commence to run until the discovery of those facts, or until, by reasonable diligence they
233 might have been discovered, if relief is sought in a court of equity. Booth vs. Lord Warrington, 4 Bro.

Parliamentary Cases, 163; South Sea Co. vs. Wymondsell, 3 P. Wms. 143; Hovenden vs. Lord Annesley, 2 Schoales & Lefroy, 607, 631; Blennerhassett vs. Day, 2 Ball & Beatty, 104, 129. This rule has been followed by the Supreme Court in numerous cases.

A leading case on this subject, and which has never been questioned, is Bailey vs. Glover, 21 Wall. 342. As stated by Mr. Justice Wood in delivering the unanimous opinion of the Supreme Court in Traer vs. Clews, 115 U. S. 528, 538: "It has never been overruled, doubted or modified by this court." In that case the court reviews the English cases, as well as its former decisions, and the conclusions there reached was:

In suits of equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. Booth vs. Lord Warrington, 4 Brown's Parliamentary Cases, 163; South Sea Co. vs. Wymondsell, 3 Peere Williams, 143; Hovenden vs. Lord Annesley, 2 Schoales & Lefroy, 634;
Stearns vs. Page, 7 How. 819 (12 L. Ed. 928); Moore vs.
234 Greene, 19 How. 69 (15 L. Ed 533); Sherwood V. Sutton, 5 Mason, 143 (Fed. Cas. No. 12,782); Snodgrass vs. Bank of Decatur, 25 Ala. 161 (60 Am. Dec. 505). And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Other cases to the same effect are Rosenthal vs. Walker, 111 U. S. 185; Traer vs. Clews, supra; Kirby vs. Lake Shore, etc., Railroad Co., 120 U. S. 130, and quoted with approval by the Circuit Court of Appeals when this case was decided on the former appeal. But it is claimed on behalf of the counsel for the defendants that Bailey vs. Glover, although not expressly overruled has been modified by later decisions which in effect overrule the principle involved in the instant case. If the fraud itself be secret in its nature, and such that its existence cannot be readily ascertained, there would be no evidence of a fraudulent concealment other than that implied from the transaction itself. Bates vs. Preble, 151 U. S. 149, 160. That these lands were obtained for the benefit of the foreign corporation, which could not obtain them, under the law, was successfully concealed. The cases
235 upon which he relies are: Kirby vs. Lake Shore, Etc., Railroad Co. supra; United States vs. Winona Railroad Co. 165 U. S. 463; Felix vs. Patrick, 145 U. S. 317; Pearsall vs. Smith, 149 U. S. 231; United States vs. Chandler, Dunbar Water Power Co., 209 U. S. 447; Kinder vs. Scharff, 231 U. S. 217; Burke vs. Southern Pacific Railroad Co., 234 U. S. 669.

A careful examination of these authorities shows that this contention of counsel cannot be sustained.

Kirby vs. Lake Shore etc. Railroad Co., is clearly distinguishable upon the facts from this case. That case follows with approval what was decided in Bailey vs. Glover, but as the plaintiff did not institute his action until the expiration [or] nearly seven years after the fraud was discovered, while the statute of limitations of the state of New York, which was pleaded in that case, limited such an action to six years, the court held that, as the full period of limitation had expired after the discovery of the fraud, the action was not brought in time.

In Felix vs. Patrick, it was held that twenty-seven years having elapsed from the time the cause of action accrued, the plaintiff was guilty of such laches as would prevent a court of equity from granting any relief.

In Pearsall vs. Smith, it was held that the [complaint] failing to state how he came to be so long ignorant of his
236 rights, the means, if any, used by the defendants fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matters alleged in the bill, the bar of the statute was not tolled.

United States vs. Winona Railroad Co. was shown by the Circuit Court of Appeals in its opinion in this case not to be applicable to the facts in this case, and the reasons therefor are so fully stated that it is unnecessary to repeat them here.

The Chandler-Dunbar Water Power Company case can have no application to the facts in this case, for there the question involved was not one of fraud, but the claim of the government was that the land in controversy had been reserved from sale. The court held that such an error of judgment on the part of the officers of the government was intended to be barred by the Act of Congress herein relied on.

In Kinder vs. Scharff, which was on error to the Supreme Court of Louisiana, it had been found by the state court that "during the pendency of the original proceeding, the trustee suspected the alleged fraud, made some inquiries, but dropped the matter, because he thought it was not wortl while, that is, that it would not pay to go further. He voluntarily abstained from availing himself of the means put in his hand by the law itself for the ascertainment of a suspected fact by examining the bankrupt, and otherwise;" and upon this finding of fact which, on error to the high-
237 est court of the state, is conclusive, the court held that the plaintiff could not recover, distinguishing the case upon these facts from Bailey vs. Glover.

In Burke vs. Southern Pacific Railroad Company, the patent was collaterally attacked by an adverse claimant. The case came before the court on certificate, and the fourth question certified was: "If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?" and the answer was: "It is conclusive upon collateral attack." It is true there were other questions certified to the court, and answered, but the case was not an action on the part of the government to set aside the patent for fraud, but a collateral attack upon the validity of the patent by one claiming the land as a settler.

Counsel also rely upon Wood vs. Carpenter, 101 U. S. 135. That was an action at law, and necessitated the construction of a statute of limitations of the state of Indiana, which had adopted the equitable rule engrafted upon the statute by the English courts of equity. While there are some expres-

sions to be found in that opinion which apparently sustain the contention of counsel for defendants, an examina
238 tion of the facts set out in the opinion shows that it in no wise affects the principle established in Bailey vs. Glover, or any of the later cases hereinbefore cited. The court said: "Upon looking carefully into the reply we find it sets forth that the concealment touching the cause of action was affected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is some generality of statement and enunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, with the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it. It will be observed that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record and he knew it. It could not have been difficult to ascertain, if the facts were so, that there were shams. The conveyances of Alvin and Kellar were also on record in the former offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clu in every case that would have led to evidence not to be resisted. With the strongest motives to action, the
239 plaintiff was supine. If underlying frauds existed as he alleges, he had to unearth them. It was his duty to make the effort. It should be borne in mind that wher the judgments were assigned to Kellar the country was in the throes of the Civil War. Lee had not surrendered. Gold and silver, in the currency of the time, were at a high premium. All real property was largely depreciated. The future was uncertain. The transaction which then seemed wise and fortunate, and yet later might be deemed greatly otherwise. It is hard to avoid the contention that the plaintiff's conduct marks the defendant between forethought in one condition of things and afterthought in another. The discovery of the cause of action, if such it may be termed, is thus set forth; 'And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the bringing of this suit.' There is nothing further upon the subject."

The court in its opinion quotes from numerous cases, and among others from Martin vs. Smith, 1 Dill. 85, where the

court held: "The fraud intended by the section, which shall arrest the running of the statute, must be one that is secret and concealed."

In Rosenthal vs. Walker, supra, the court distinguished Wood vs. Carpenter from Bailey vs. Glover, saying; "Neither case refers to the opinion of the court in Bailey vs. Glover, or can be held to overrule or modify it. The case of
240 Bailey vs. Glover has been often cited by this court, but has never been doubted or qualified."

Upon the facts found by the court, this action is not barred by the six-year statute.

There is one other question raised by counsel for the defendants which requires consideration: It developed during the testimony that there were two separate corporations, called the Exploration Company, Limited, both organized under the laws of Great Britain, and having their domicile in London. For convenience they will be referred to as the old and the new companies.

The old company was organized in 1896 and was the company for whose benefit the lands in controversy were entered, and by whom the money for them was furnished. In March, 1904, that company, having considerable assets which were considered of doubtful value, its officers and shareholders decided to organize two new corporations, one the Exploration Company, Limited, and the other the Exploration Assets Company. All the valuable assets, including the lands in controversy, to which it had the equitable title, the legal title being held in trust for it, as hereinbefore stated, were transferred to the new Exploration Company, while the other assets were transferred to the Exploration Assets Company. The first assets constituted three-fifths, and the other assets two-fifths of the property belonging to the old com-
241 pany. The shareholders of the old company surrendered their shares to two liquidators, who were officers of the old company as well as the new company, and received in exchange therefor, for every five shares they held in the old company, three shares in the new Exploration Company and two shares in the Assets Company. The officers elected for the new company were the same as those for the old company. The agent of the old company in the United States continued for a few months, when he died, and thereupon, on September 23, 1904, the defendant Foster was appointed as the agent of the new company for the United States, and the lands in controversy conveyed to him by Mr. Smith, to hold them in trust for the Exploration company. The old com-

pany has no assets whatever and has had none since the organization of the two new corporations. It is now claimed by one of the counsel for the defendants that it is the old company which entered its appearance in this case and not the new company, and as Mr. Foster holds the lands in trust for the new company, no decree can be rendered against that company.

As the Exploration Company had no agent in the state of Colorado upon whom service could be had, and Mr. Foster also resided out of the district of Colorado, they were brought into court under the provisions of section 8 of the Judiciary Act of March 3, 1875. They entered their appearance, filed their answers and are making this defense. Nothing was said about the two companies either in the pleading or
242 in any other way until this final hearing.

In view of the fact that both of these companies had the same name, the same officers, and the lands in controversy are held in trust for one of them, it is wholly immaterial that a new company was formed. If it was intended by the parties to avoid the consequences of their fraud and escape any liabilities incurred by the old company it was a clumsy effort which can not prevail in a court of equity. The Linn & Lane Timber Co. vs. The United States, 236 U. S. 575. If such a defense was to be set up, the least that good faith required would have been that the attention of the plaintiff should have been called to that fact by the pleadings.

Upon the whole case the court is of the opinion that the plaintiff is entitled to a decree setting aside the patents to all the lands set out in the complaint and the defendants be taxed with the costs of this proceeding.

Endorsed: Findings of Fact and Memorandum of Opinion, Trieber, District Judge. Filed Aug. 9, 1915, Charles W. Bishop, Clerk.

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243 (Clerk's Certificate to Opinion of District Court.)

United States of America,
District of Colorado—ss.

I, Charles W. Bishop, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from two hundred twenty-six (226), to two hundred and forty-two (242), to be a true, perfect, and complete transcript and copy of opinion of Honorable Jacob Trieber, heretofore handed down and filed in said court and in a certain cause lately in said court

pending, wherein The United States of America was plaintiff and Exploration Company, Limited, R. T. Bayliss, Alexander Burrell, Albert L. Smith, Henry Burrell and Philip L. Foster were defendants, as fully and completely as the same still remains on file in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court at the City and County of Denver in said district, this tenth day of March, A. D. 1916.

Seal
U. S. Dist. Court
Dist. of Colorado.

CHARLES W. BISHOP,
Clerk.

Documentary
Stamp
Canceled
Mar. 10, 1916.

Filed Mar. 16, 1916. John D. Jordan, Clerk.

And thereafter the following proceedings were had in the Circuit Court of Appeals in said cause, viz:

(*Order of Submission.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1916.

SATURDAY, May 27, 1916.

No. 4676.

EXPLORATION COMPANY, LIMITED, et al., Appellants,
vs.
UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Henry McAllister, Jr., for appellants and concluded by Mr. Frank Hall, Special Assistant to the Attorney General for the appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1916.

No. 4676.

EXPLORATION COMPANY, LIMITED, and PHILIP L. FOSTER, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the District of Colorado.

Mr. Henry McAllister, Jr., (Mr. George E. Tralles was with him on the brief), for appellants.

Mr. Frank Hall, Special Assistant to the Attorney General (Mr. Harry B. Tedrow, United States Attorney, was with him on the brief), for appellee.

Before Smith and Carland, Circuit Judges, and Amidon, District Judge.

CARLAND, *Circuit Judge,* delivered the opinion of the Court:

This case was before us at a former term of the court on an appeal from a decree sustaining a demurrer to the complaint. The decree was reversed. United States v. Exploration Company, 203 Fed. 387. A trial of the case has been had and a decree rendered in favor of the plaintiff. Defendants have again appealed assigning error.

The principal question in the case now as well as on the former appeal is as to whether plaintiff's cause of action at the time the complaint was filed had been barred by the statute limiting the time for the institution of suits to vacate and annul land patents. The statute referred to may be found in 26 Stat., 1095, 1099, 1093; and 29 Stat. 42, being the acts of March 3, 1891, and March 2, 1896. We are not asked to reverse our former decision holding that the cause of action was not barred, and we adhere to our former ruling, the reasons for which are stated at length in the opinion of the court on the former appeal. It is now claimed, however, that the evidence introduced at the trial in support of the complaint failed to establish the facts alleged. The trial court made findings of fact and they appear in United States v. Exploration Company, Limited, 225 Fed. 854.

We have carefully considered the evidence taken at the trial and find that it fully supports the findings of the trial court. It is now claimed, however, that our former ruling on the Statute of Limitations was based on the allegations of the complaint to the effect that the defendants actively engaged in a conspiracy to conceal the fraud committed in obtaining the patents. In deciding the questions raised by the demurrer we of course referred to the language of the complaint, but the reason for our ruling, and the authorities cited in support thereof applied to cases of concealed fraud whether active or passive. In our former opinion we quoted an excerpt from Bailey v. Glover, 88 U. S. 342, as follows:

"To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

Indeed the rule seems to be well established. The important question in this case is as to whether it may be applied to the Statute of Limitations under consideration. For the reasons stated on the former appeal which need not be reported here we hold that it does. In the case at bar the defendants did not advertise the fact that they were committing a fraud nor did they discuss the fraud among themselves in the presence of others, but the manner in which the fraud was committed constituted all the concealment that was necessary. After it was supposed the Statute of Limitations had barred any action the participants in the fraud talked very freely, telling the truth when it was thought it would do no harm. The

findings of the trial court in our judgment are fully sustained by the evidence and the findings sustain the decree rendered.

In regard to the point that the right Exploration Company was not sued we are satisfied with the disposition of that question, and the reasons therefor appearing in the opinion of the trial court, 225 Fed. 860. It is further objected that the decree entered should have recognized the interest of one Alexander Burrell. Burrell was originally named as a defendant in the suit. He appeared and filed a separate demurrer. The demurrer was sustained and a decree entered dismissing him from the case. On the former appeal counsel moved to dismiss the same for the reason that Burrell was a party defendant in the court below, and was not made a party on the appeal. We then decided that it did not appear that Burrell, taking the allegations of the complaint to be true, had any interest in the controversy, nor does it now appear from the evidence. Having demurred to the complaint on the ground that it stated no cause of action against him, Burrell cannot now be heard to say that he should be recognized in the decree.

The decree is Affirmed.

Filed August 2, 1916.

(*Decree.*)

September Term, 1916.

MONDAY, September 4, 1916.

No. 4676.

EXPLORATION COMPANY, LIMITED, and PHILIP L. FOSTER, Appellants,

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed without costs to either party in this Court.

September 4, 1916.

(*Stipulation as to Amount in Controversy.*)

It is stipulated that the matter in controversy in the above entitled cause exceeds $1,000.00, besides costs.

Dated September 5, 1916.

HENRY McALLISTER, JR.,
GEORGE E. TRALLES,
Solicitors and Attorneys for Appellants.
FRANK HALL,
Special Ass't to the Att'y General;
EUGENE B. LACY,
Acting U. S. Att'y,
Solicitors and Attorneys for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 5, 1916.

(*Affidavit of Philip L. Foster as to Amount in Controversy.*)

STATE OF NEW YORK,
County of New York, ss:

Philip L. Foster, being first duly sworn on his oath deposes and says:

That he is one of the appellants in the above entitled cause and is familiar with the lands described in the bill of complaint in said cause, and the patents to which were ordered cancelled by the decree of the District Court of the United States for the District of Colorado, entered on August 25, 1915, and from which the above entitled appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit.

Said lands consists of 1,120 acres, more or less, and they are located in the Counties of Delta and Gunnison in the State of Colorado.

Affiant is informed and believes, and states the fact to be, that the purchase price paid to the United States of America for said lands at the time of final entries thereof, respectively, in the year 1902, was at the statutory rate of $10.00 per acre, or a total of $11,200.00, more or less.

Affiant further states that he is familiar with the location of said lands and knows that ever since the entry and patenting of said lands the same have been of a value not less than the Government price thereof aforesaid, and they are now of a value not less than $11,200.00.

Said lands have been assessed for taxes by the proper taxing officials of the said Counties of Delta and Gunnison, in the State of Colorado, for many years last past, and in each and every year the valuation placed thereon by the assessing and taxing officials of said Counties has exceeded the aforesaid sum of $11,200.00.

PHILIP L. FOSTER.

Subscribed and sworn to before me this 29th day of August, 1916.

[SEAL.] CHARLES S. MARTIN,
Notary Public, Notary Public,
New York County, No. 72.

New York Register, No. 8191.

My commission expires March 31, 1918.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sept. 5, 1916.

(*Petition for Appeal to Supreme Court U. S.*)

The above named appellants, Exploration Company, Limited, and Philip L. Foster, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment has been therein rendered on the 4th day of September, 1916, affirming the decree of the District Court of the United States for the District of Colorado, and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellants pray that an appeal be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And they further pray that such appeal shall operate as a supersedeas, and to that end they pray that the amount of their bond on such appeal, conditioned to operate as a supersedeas, shall be fixed.

HENRY McALLISTER, JR.,
GEORGE E. TRALLES,
Solicitors and Attorneys for said Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 5, 1916.

(*Assignment of Errors on Appeal to Supreme Court U. S.*)

And now come the appellants, Exploration Company, Limited, and Philip L. Foster, and say that in the record and proceedings herein, including the judgment and decree entered on or about the 4th day of September, 1916, (and also the judgment and decree entered on or about the 13th day of January, 1913, which reversed the decree of the Circuit (now District) Court entered on the 13th day of

November, 1911, and directed the District Court to overrule the demurrer of defendants to the bill of complaint), there is manifest error, and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

First. In reversing (by its decree entered on the 13th day of January, 1913) the decree of the Circuit (now District) Court entered on the 13th day of November, 1911, and in directing said District Court to overrule the demurrer of the defendants to the bill of complaint; such error resulting from the other errors specified in the following assignments numbered "Fourth", "Sixth" and "Eighth", and each of them (See opinion of said Circuit Court of Appeals rendered January 13th, 1913, 203 Fed. 387).

Second. In affirming (by its decree entered on the 4th day of September, 1916) the decree of the United States District Court for Colorado entered on the 25th day of August, 1915; such error resulting from the errors specified in the following assignments numbered from "Fourth" to "Eleventh", inclusive, and each of them.

Third. In failing and refusing to reverse said last mentioned decree of the District Court and to remand said cause with instructions to dismiss the bill of complaint; such error resulting from the other errors specified in the following assignments numbered from "Fourth" to "Eleventh", inclusive, and each of them.

Fourth. In holding and deciding that under the allegations of the bill of complaint this suit was not barred by lapse of time and by the Statutes of the United States, because it was instituted more than six years after the dates of issuance of the respective patents sought to be annulled (26 Stat. at Large, pp. 1095, 1099; 29 Stat. at Large, p. 42); and, therefore, in holding that defendants' demurrer to the bill was not well founded, and in reaffirming the former opinion and decree of said United States Circuit Court of Appeals, directing that such demurrer be overruled (203 Fed. 387).

Fifth. In holding that upon the facts disclosed and established by the testimony herein this suit was not barred by lapse of time and by the aforesaid Statutes of the United States, because it was instituted more than six years after the dates of issuance of the respective patents sought to be annulled.

Sixth. In refusing to find and decree that under the aforesaid Statutes of the United States the patents sought to be annulled by the bill of complaint were, by reason of the fact that this suit was not begun within six years from the dates of the issuance of such patents, forever validated and confirmed even though originally void or voidable.

Seventh. In holding that notwithstanding the evidence conclusively established, and the court found, that the defendants, or any of them, did not actively conceal the facts, or any of them, out of which the alleged frauds arose, and were not guilty of any affirmative acts of fraud or concealment, during the period of six years subsequent to the dates of the issuance of said patents, the said patents were properly cancelled and annulled by the District Court.

Eighth. In holding that notwithstanding the plain language of the statute, to-wit:

"That suits by the United States to vacate and annul * * * patents hereafter issued shall only be brought within six years after the date of the issuance of such patents" (26 Stat. at Large, pp. 1095, 1099; see also 29 Stat. at Large, p. 42),

such statute does not apply to cases where the patents were procured through fraud; or, if it does apply at all to such cases, that the six year period must be computed from the date whereon the alleged fraud was discovered by the United States and not from the "date of the issuance of such patents."

Ninth. In refusing to find and adjudge that the decree of the District Court entered August 25, 1915, should be reversed with directions to dismiss the bill, for the reason that the said bill charged the defendant Exploration Company, Limited, with being a party to the alleged original unlawful conspiracy to secure title to the lands in question in this suit, and with being one of the conspirators at whose instance the respective entries in question were made and patents thereon procured, and with being a party to all the alleged unlawful acts set forth in the bill; whereas the evidence wholly failed to sustain such allegations, or to justify a decree in favor of the plaintiff based thereon.

Tenth. In holding that although there is a final judgment and decree in this cause in favor of one Alexander Burrell, a former defendant herein, and against the plaintiff, entered on the 13th day of November, 1911, it was not necessary that the final decree of the District Court against these appellants entered August 25, 1915, should save the rights of said Alexander Burrell.

Eleventh. In holding that it does not appear from the evidence that said Alexander Burrell has any interest in the controversy, so that his rights should have been saved by the decree of the District Court entered on the 25th day of August, 1915.

Wherefore the appellants pray that said judgment and decree of said Circuit Court of Appeals entered on the 4th day of September, 1916, and also a judgment and decree entered on the 13th day of January, 1913 (and also the judgment and decree of said District Court for Colorado entered on the 25th day of August, 1915) may be reversed in all things, and that mandate issue directing that the bill of complaint be dismissed.

HENRY McALLISTER, JR.,
GEORGE E. TRALLES,
Solicitors and Attorneys for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 5, 1916.

(Order Allowing Appeal to Supreme Court U. S.)

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed; and the amount of the bond upon such appeal, duly condi-

tioned to operate as a supersedeas, is hereby fixed at the sum of One Thousand Dollars ($1,000.00).

Done this 5th day of September, 1916.

JOHN E. CARLAND,
United States Circuit Judge and Judge of United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 5, 1916.

(Supersedeas Bond on Appeal to Supreme Court U. S.)

Know all men by these presents, that we, Exploration Company, Limited, a corporation, and Philip L. Foster, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, are held and firmly bound unto the United States of America in the full and just sum of One thousand Dollars ($1,000.00) to be paid to the said the United States of America; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of September, 1916.

Whereas, lately at the September Term of the United States Circuit Court of Appeals for the Eighth Circuit, in a suit depending in said court between said Exploration Company, Limitd, and Philip L. Foster, as appellants, and the United States of America, as appellee, a decree was rendered and entered against said Exploration Company, Limited, and Philip L. Foster; and said Exploration Company, Limited, and Philip L. Foster having prayed for and been allowed an appeal to the Supreme Court of the United States to reverse said decree, and a citation directed to said the United States of America citing and admonishing it to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Exploration Company, Limited, and Philip L. Foster shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

EXPLORATION COMPANY, LIMITED, AND
PHILIP L. FOSTER,
By HENRY McALLISTER, JR.,
Their Agent and Solicitor.
NATIONAL SURETY COMPANY,
[SEAL.] By C. H. TONCRAY, *Attorney in Fact.*

Approved this 5th day of September, 1916.

JOHN E. CARLAND,
U. S. Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 5, 1916.

United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA,
Eighth Circuit:

To the United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, Thirty days after the date of this Citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals, for the Eighth Circuit, wherein Exploration Company, Limited, and Philip L. Foster are Appellants, and you are Appellee, to show cause, if any there be, why the Decree rendered against the said Appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John E. Carland, Circuit Judge and Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 5th day of September, A. D. 1916.

JOHN E. CARLAND,
U. S. Circuit Judge and Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Service of the within Citation is hereby acknowledged and accepted for and on behalf of Appellee, The United States of America, this 7th day of September, A. D. 1916.

E. B. LACY,
Acting United States Attorney, District of Colorado, Solicitor for Appellee.

[Endorsed:] No. 4676. United States Circuit Court of Appeals, Eighth Circuit. Exploration Company, Limited, and Philip L. Foster, Appellants, vs. United States of America, Appellee. Citation on Appeal to Supreme Court of the United States. Filed Sep. 7, 1916. John D. Jordan, Clerk.

(*Stipulation as to Transcript of Record upon Appeal to Supreme Court U. S.*)

It is stipulated between the parties to the above entitled cause, in pursuance of Section 1 of Rule 8 of the Rules of the Supreme Court of the United States, that the following portions of the record, and those only, shall be incorporated in and constitute the transcript of record upon the appeal of said cause from the United States Circuit Court of Appeals of the Eighth Circuit to the Supreme Court of the United States:

I. The entire record as printed in the said Circuit Court of Appeals.

II. The following record and proceedings in said United States Circuit Court of Appeals on such appeal:

(1) The record of hearing in said United States Circuit Court of Appeals, at St. Paul, on May 27, 1916;

(2) The opinion of said United States Circuit Court of Appeals, affirming the decree of said District Court, filed on or about August 1, 1916;

(3) The decree of said United States Circuit Court of Appeals entered September 4th, 1916;

(4) The stipulation of parties as to amount in controversy, filed September 5th, 1916;

(5) Affidavit of Philip L. Foster as to amount in controversy, filed September 5th, 1916;

(6) Petition of Exploration Company, Limited, and Philip L. Foster, for appeal to the United States Supreme Court, filed September 5th, 1916;

(7) Their assignment of errors on such appeal, filed September 5th, 1916;

(8) Order allowing appeal to the United States Supreme Court, entered September 5th, 1916;

(9) Supersedeas bond on such appeal, approved and filed September 5th, 1916;

(10) Citation on such appeal, dated September 5th, 1916, and filed September 7th, 1916;

(11) This stipulation.

(12) The certificate of the Clerk of the United States Circuit Court of Appeals certifying the record to the Supreme Court of the United States.

Dated Denver, Colorado, September 7th, 1916.

HENRY McALLISTER, JR.,
GEORGE E. TRALLES,
Solicitors and Attorneys for said Appellants.
FRANK HALL,
(*Special Assistant to the Attorney General*);
E. B. LACY,
(*Acting U. S. Attorney*);
Solicitors and Attorneys for said Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 7, 1916.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Colorado as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true

and complete copies of the pleadings, record entries and proceeding
including the opinion, had and filed in the United States Circu
Court of Appeals, except the full captions, titles and endorsemen
omitted in pursuance of the rules of the Supreme Court of the Unite
States, prepared in accordance with the stipulation of the parties, i
a certain cause in said Circuit Court of Appeals wherein Exploratio
Company, Limited, and Philip L. Foster are Appellants and Th
United States of America is Appellee, No. 4676, as full, true an
complete as the originals of the same remain on file and of record i
my office.

I do further certify that the original citation with acknowledgmen
of service endorsed thereon is hereto attached and herewith returne

In Testimony Whereof, I hereunto subscribe my name and affi
the seal of the United States Circuit Court of Appeals for the Eight
Circuit, at office in the City of St. Louis, Missouri, this twentie
day of September, A. D. 1916.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.

Endorsed on cover: File No. 25,516. U. S. Circuit Court Appeals
8th Circuit. Term No. 686. Exploration Company, Limited, an
Philip L. Foster, appellants, vs. The United States. Filed Septem
ber 28th, 1916. File No. 25,516.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 277.

EXPLORATION COMPANY, LIMITED, AND PHILIP L. FOSTER,
APPELLANTS,

VS.

THE UNITED STATES OF AMERICA,
APPELLEE.

On Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLANTS.

I.

STATEMENT OF THE CASE.

This case presents for determination the effect of the Act of Congress of March 3, 1891, providing "that suits by the United States to vacate and annul any patent heretofore issued shall only be brought

within five years from the passage of this act, and suits to vacate and annul patents *hereafter issued shall only be brought within six years after the date of the issuance of such patents*"* (26 Stat. 1099, 1093; Comp. Stat. 1916, Sec. 5114).

This suit was instituted March 3, 1911 (rec. p. 1) by the United States to set aside and annul, because of alleged fraud in the procurement, nine certain patents to about 1,120 acres of coal lands in Colorado, issued and dated, as shown in the bill and later by the evidence, on September 6th and on October 16, 1902, all more than eight years before the suit was begun (rec. pp. 5-6, 56, 58, 59, 60, 61, 63, 72, 126).

Thereafter the present appellants, who were two of the defendants, filed their joint and several demurrer, wherein they alleged that as it appeared upon the face of the bill that the patents sought to be cancelled were issued and dated more than six years prior to the date whereon the suit was brought, such suit was barred by the foregoing statute (rec. p. 16). Alexander Burrell, who was also named as a defendant, filed a like demurrer (rec. p. 18). The Circuit Court (now District Court) for Colorado rendered an opinion sustaining these demurrers (190 Fed., 405), and a decree of dismissal in conformity with that opinion was entered (rec. p. 19). Thereafter the United States prosecuted an appeal to the Court of Appeals for the Eighth Circuit from that decree in so far as it was in favor of the present appellants, but not from the decree sustaining the demurrer of the defendant, Alexander Burrell. The Court of Appeals

*Italics in quotations throughout this brief are generally ours.

reversed the decree of the lower court in favor of these appellants (203 Fed., 387), and remanded the case to the District Court for further proceedings in conformity with its opinion (rec. p. 20).

Thereafter issues were joined and evidence presented (almost wholly on depositions), and on final hearing a decree was directed and entered for the United States cancelling the patents, etc. (opinion, rec. p. 147, 225 Fed., 854; decree, rec. p. 38.) An appeal was then taken to the Court of Appeals which affirmed this decree (235 Fed., 110; rec. pp. 159, 160).

This appeal was then taken.

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(1) *The Pleadings.*

The bill (rec. pp. 1-15) alleged that the defendant company (namely, the Exploration Company, Limited) was a corporation of Great Britain and that the defendant Foster was its representative and agent, and held title to the lands involved in the suit as trustee for its use; that about March 1, 1902, the defendant company devised a scheme to defraud the United States of the lands involved, and that to such end divers of its officers and agents procured qualified persons to enter and purchase coal lands ostensibly for their benefit, but in fact for the benefit of the defendant company, and pursuant to such unlawful scheme the defendant company procured nine persons to enter and purchase the coal lands involved in the suit; that all of the entries and purchases were made for the benefit of the defendant company pursuant to an antecedent agreement between it and the entrymen, by which the lands were to be acquired for the

use of the defendant company and the title so acquired was to be conveyed to such person as the defendant company should nominate, in secret trust for its benefit, the defendant company paying all expenses and costs incurred in making the entries and purchases and to pay to each entryman the sum of $25.00 (rec. pp. 6-7); that the entrymen were induced to make the entries and purchases in a clandestine and surreptitious manner, with an agreement and understanding between all parties to the transaction that the true facts relating thereto should be concealed, particularly from the knowledge of officers of the United States, and the conspirators and entrymen fraudulently, unlawfully and dishonestly did conceal the same (rec. pp. 7-8); that the entrymen executed certain false and fraudulent affidavits in connection with their entries (rec. pp. 8-9); that neither the United States nor any of its officers or agents had knowledge of the true facts and because of the false statements of the entrymen accepted and approved the entries and issued patents (rec. pp. 9-10); that the true facts were concealed from the United States by the defendant company in order that the government should be kept in ignorance thereof and be delayed, obstructed and defeated in the institution and prosecution of any suit to enforce its rights, and that should such proceedings be commenced the defendant might plead delay in the institution thereof as a defense to the action (rec. p 10); that in order to accomplish this result the alleged conspirators and entrymen agreed at all times to conceal from the United States the true facts, and have done so, and have obstructed, hindered and deceived the United States in the ascertainment

of such facts; that such purpose of concealment was consummated by corrupt, fraudulent, clandestine and surreptitious devices and particularly as follows: The alleged frauds were designed, executed and consummated in a clandestine and surreptitious manner and because thereof were only known to the parties; that it was understood and agreed by the alleged conspirators "that the true facts in the premises should be at all times concealed from the complainant," and each entryman was "enjoined, hired and paid to at all times conceal the facts in the premises from the complainant" and has done so (rec. p. 10); that with like purpose each entryman executed and delivered his deed purporting to convey the legal title to the lands to the defendant Alexander Burrell for a stated consideration, but in fact without consideration except the sum of $25.00; that said Burrell took no beneficial interest in the lands but acted as a secret trustee for the defendant company for the purpose of deceiving the United States (rec. p. 11); that false dates were inserted in the deeds and acknowledgments for the purpose of deceiving the United States (rec. p. 11); that with the same purpose the defendant Burrell executed his deed conveying the lands to one Albert L. Smith, without consideration, said Smith acting as the secret trustee for the defendant company, and he permitted the title to pass through him to the defendant Foster, also alleged to be a secret trustee for the defendant company (rec. pp. 11-12); that the defendant Foster afterwards executed an instrument in writing declaring the beneficial interest of the defendant company in the lands in question, but such instrument was withheld from the official records of

the counties wherein the land was situated, all for the purpose of further deceiving and defrauding the United States (rec. p 12); that the alleged conspirators have been assisted in the consummation of their fraudulent purpose of concealment by the remote situation of the lands and by the fact that the alleged frauds were of such nature as to conceal themselves (rec. p. 13); that by reason of the foregoing the United States and its officers were deceived and kept in ignorance of the true facts and had no knowledge or information concerning the same until about April 12, 1909, when two of its agents made a joint report to the Commissioner of the General Land Office charging the perpetration of the alleged frauds, and thereafter the Departments of Interior and Justice engaged in a continuous and diligent prosecution and investigation to ascertain the true facts, and in the preparation and institution of the appropriate judicial proceedings; that by the aforesaid alleged and unlawful clandestine practices the defendant company at all times deceived, hindered, obstructed and delayed, and still does deceive, obstruct and delay the United States and its officers in investigating and ascertaining the true facts, and that the principal object and purpose of the defendants in concealing the facts was to delay the institution of judicial proceedings by the United States until six years had elapsed from the date of the issuance of the patents, in order that they might plead and rely upon this as a defense to any proceedings that might be instituted (rec. pp. 13-14).

The answer (rec. pp. 22-37) of the defendants Exploration Company, Limited, and Foster, admitted

that the latter held title in trust for the defendant company but not in *secret* trust; it admitted that the various entries were made by the persons named in the bill, at the times therein stated, and that patents were thereafter issued bearing the dates alleged in the bill; but all allegations of fraud, conspiracy, etc., were denied. The six-year statute was separately pleaded as a defense (rec. pp. 36-37).

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(2) *The Evidence.*

All but two of the entrymen testified (Edyth Cartwright, p. 44; Daniel S. Baldwin, p. 57; Emma F. Nutter, p. 59; Anna Nutter, p. 60; Charles P. Nutter, p. 61; Stella M. Fairlamb, p. 63; John Davis, p. 70). All except John Davis and Stella M. Fairlamb swore, in substance, that they made their entries upon the suggestion of either C. A. Molson, John Davis or Millard Fairlamb; that they were told that they could make as much as $25.00 out of the land to be entered by them; that they had no intention of paying the government's price themselves nor of acquiring the land for their own use and benefit, nor did they do so. However, none of them testified that he or she knew or heard of the defendant company in the transaction. It is perfectly evident, however, and we now concede that these witness entrymen did not acquire the land for their own benefit or pay therefor. Therefore their testimony on this subject need not be related at length.

Each of them positively testified (and no evidence disputes them) that there was no agreement or understanding of any kind with any one to conceal any of

the facts connected with the entries from the United States or any of its officers, and that they never did conceal or refuse to disclose the same. (Cartwright, p. 57; Baldwin, p. 58; Emma F. Nutter, p. 60; Anna Nutter, p. 60; Charles P. Nutter, p. 61; Stella M. Fairlamb, p. 64; John Davis, p. 75.)

These entrymen deeded their lands by warranty deed to Alexander Burrell and most of them testified to the receipt of $25.00 therefor.

The government's contention was that the Exploration Company participated in the making of the entries through one Henry Burrell and one C. A. Molson, both of whom died before the suit was commenced. Molson was (with respect to certain business transactions) an agent and employee of the defendant company (rec. pp. 103-107), but his death prevented the defendants from presenting his version of the transactions. This circumstance itself demonstrates the importance of a limitation of time for the institution of such suits as this. The testimony aside from that of the entrymen was substantially as follows:

John Davis, one of the entrymen, testified (rec. pp. 70-75) that through his brother-in-law, Donohue (a witness), he interested the late Henry Burrell and the late C. A. Molson in the lands and subsequently Henry Burrell arranged with him to file on the land. Mr. Burrell wanted a lawyer and the witness introduced Burrell to Mr. Millard Fairlamb, who afterwards made out the filing papers. The witness had no contract, agreement or understanding with Henry Burrell for securing title nor was he employed by Burrell. Donohue and the wit-

ness were to get twenty per cent of the amount paid the government for the lands as consideration for locating them. Molson never told the witness that he was acting for any other person, association or corporation but, over defendants' objection, the witness stated that Donohue had told him Molson was working for the Exploration Company, and, over the objection of the defendants, the witness testified that Henry Burrell told him the land was for the Exploration Company. Before he secured parties to make the filings there was no arrangement that the lands were to go to the Exploration Company. Ella Davis was the wife of the witness, who talked with her about making her entry, and so did Henry Burrell. The intention of the witness and his wife in making the entries was to pay for the land themselves and they did not intend to turn it over to any one. Afterwards the witness deeded the lands embraced in his entry to some one whose name he does not remember but who was designated by Fairlamb. He did not pay the purchase price to the government and does not know who paid the money. His wife, Ella Davis, did not pay the purchase price for her entry, but Henry Burrell and Fairlamb promised to pay her $25.00 for the entry. The witness went to Fairlamb for advice and counsel in carrying on matters pertaining to the entries, and Fairlamb was employed by Henry Burrell. At no time from the inception of the transaction to the present time has the witness refused to tell any agent or officer of the government all he knew about the entries and transaction. There was no understanding or agreement with the entrymen that the true facts with relation to the entries should be concealed from the government nor did the witness or his wife

or any other person connected with the transaction conceal or attempt to conceal the true facts. He never knew of any intention on the part of Henry Burrell, Alexander Burrell, Molson or the Exploration Company to keep the transaction secret.

Patrick J. Donohue testified (rec. pp. 75-79) that he was acquainted with C. A. Molson, R. T. Bayliss, Henry Burrell and Alexander Burrell; that he had met these men in connection with other properties owned by the Exploration Company, Limited; that the witness had brought the coal properties in question in this suit to the attention of Mr. Molson, as a result of which an agreement (not introduced in evidence) was entered into between him and Mr. Molson, who was the Examining Engineer for the Exploration Company, Limited (and who signed as "Agent"), by which this property was to be acquired. Under the terms of the contract he testified he was to receive 10 per cent and John Davis likewise 10 per cent, which compensation was to be based upon the purchase price paid to the United States for the lands. Over the objection of the defendants the witness testified that Mr. Molson told him that the Exploration Company would handle the matter. After the contract was made the witness accompanied Henry Burrell to Delta, Colorado, at the request of Molson and on orders from Alexander Burrell. While at Delta an examination of the coal properties was made and Henry Burrell took samples and talked the matter over with John Davis there and secured his consent to act in locating and obtaining lands.

Millard Fairlamb testified (rec. pp. 65-70) that he had acted as attorney for Henry Burrell in connec-

tion with the acquisition of titles to the land. The first he knew about these coal lands was from John Davis who came to him about February, 1902, and said he had some friends and relatives who wanted to file on coal lands. Some time after that he met Davis on the street and the latter told him he would be in in a few days to have some filing papers made out. In April Burrell introduced the witness to Molson. He understood Burrell and Davis were trying to interest Molson in the purchase of the land. Henry Burrell did not tell the witness whether he represented any other persons than himself in this transaction and he understood Burrell was there on his own behalf.

Alexander Burrell testified (rec. pp. 83-87) for the United States to his general experience with various mining companies in this country. He was never employed by the Exploration Company, Limited, except on one occasion for two or three days in looking over some property in Montana. He was a brother of the late Henry Burrell. He personally did not have anything to do with acquiring title to the lands involved in this suit, but he is the one to whom title was conveyed by the various persons who made entries. He did not pay any money to the respective grantors in these deeds and did not deal directly with them; the arrangement which culminated in the conveyance of the various titles to him was made by his brother, the late Henry Burrell. He was to receive an interest in the property, promised to him by Molson, who had conceived the idea of going into the coal business. Mr. Molson was employed as Consulting Engineer by the Exploration Company, Limited, for examining various inter-

ests in the United States and Mexico. He is dead. The witness was also acquainted with the defendant, Philip L. Foster, and knew of his employment by the Exploration Company, Limited. The witness testified (rec. p. 85) that after he received the title to the lands in question in this suit he transferred the same to one Albert L. Smith, of Helena, Montana. The circumstances under which he made the transfer were that he was about to leave this country for old Mexico and it was considered desirable that the title should be transferred to Mr. Smith as a matter of convenience; he thought Mr. Molson suggested this. The title to these lands was originally placed in his name as a result of a meeting between Mr. Molson, his brother Henry and himself. This meeting was held at Helena, Montana, at which time it was agreed that the three persons present should form a syndicate to acquire some coal lands; the manner of acquiring these lands was left entirely to his brother, Henry Burrell, and the interest which he, Alexander Burrell, was to receive was to be one-half of that which his brother received, which was later fixed at one-fourth; and at the time the lands were acquired the defendant company had no interest in them. The witness testified that he personally advanced $1,800.00 toward the expenses incident to acquiring these lands; and that he had an interest in the property, namely, one-half of his late brother's one-fourth (rec. pp. 85-87).

Albert L. Smith testified (rec. pp. 79-81) that he was the President of the National Bank of Montana, residing at Helena, and had known Alexander Burrell for twenty-five years. The witness knew Mr. Molson, but never had any business with the Exploration Company. The witness was the same party to

whom Alexander Burrell conveyed the property in question. No consideration passed from him to Burrell for these conveyances, and he did not know how the title came to be conveyed to him by Burrell. Mr. Molson told him that he had had some property deeded to him in Colorado. The witness did not have the deeds recorded nor authorize any one to accept and receive possession for him. He did not recall when he deeded the lands away, and no consideration was paid by Mr. Foster or any other person or corporation to him for making the deeds, which were made at the request of Mr. Molson. The witness did not act in the matter as a secret trustee for or in behalf of the Exploration Company, or ever enter into any agreement or arrangement with it, or any officer, that he should act as trustee. There was no agreement between him and the Exploration Company that he should permit the title to the lands to pass through him to Foster for the purpose of deceiving or defrauding the United States. When he executed the deeds for the lands to Foster there was no purpose or intent of effecting any fraudulent or unlawful scheme, nor for the purpose of concealing anything with reference to the transaction. He never agreed with the Exploration Company or Mr. Foster, or any one else, that the true facts with reference to the transaction should be concealed from the government, nor has he refused at any time to tell all he knew concerning the facts. He never knew that the Exploration Company or any of its officers had anything to do with the matter. Molson had a great deal of personal business with the witness of various kinds. This transaction, so far as the witness was concerned, was similar to other business transactions he had for a number of

years before and thereafter with Mr. Molson. It was merely an accommodation to the latter.

Philip L. Foster testified for the plaintiff (rec. pp. 87-91) that he was a mining engineer, residing in New York City, and has been employed by the defendant Exploration Company, Limited, as mining engineer under a power of attorney dated September 23, 1904, the material parts of which are set forth in the record (rec. p. 88).

He was not personally familiar with the lands involved in this suit; he had known Alexander Burrell for twenty years and the said Burrell was never employed by the Exploration Company to his knowledge. He was acquainted with Charles A. Molson in his lifetime and he was employed by the Exploration Company from about 1897 to the time of his death. Molson maintained an office at Salt Lake City for the Exploration Company and his duties were more or less similar to those of the witness, who never acts for the company without first submitting the matter to its board. He is acquainted with R. T. Bayliss who in 1901 was the mining adviser to the Exploration Company, Limited, and subsequently, in 1902 or 1903, became managing director and chairman of the board of directors of the Exploration Company, Limited. He (the witness) had nothing to do with the transaction by which the lands in question were acquired and his first connection with the matter was the receipt by him of the deeds about the end of 1904, transferring the title from Albert L. Smith to himself, and for which he paid no consideration. Molson was engaged in private enterprises at the time of his connection with the Exploration Company. Some of these

private enterprises the Exploration Company subsequently became interested in but at the time Mr. Molson took them up the Exploration Company had no interest whatever. The witness testified that after he had acquired the legal title to the lands in this suit, on various occasions he discussed with others the fact that he held these properties for the Exploration Company; that he hoped to sell the lands and that he never at any time sought to conceal the fact that he held these properties as trustee for the Exploration Company, but on the contrary informed any person he thought might be likely to purchase them that such was the fact; that he never sought at any time to conceal from the United States or any of its officers or agents the facts relative to the acquisition of these lands by himself as trustee for the Exploration Company and that he at no time has executed any document or instrument in writing declaring and expressing the beneficial interest of the Exploration Company in these lands for the purpose of defrauding or deceiving the United States, or otherwise, but that the only document that he ever executed with reference to these lands was the yearly letter written to the Exploration Company at its home office in which he acknowledged that he held these lands on their account, which letter was submitted to public accountants and incorporated in the annual report of the Company. The witness further testified that he had an interview with M. D. McEniry, Chief of the Field Division of the General Land Office of the United States in the spring of 1909 and that he told him in substance the matters to which he had previously testified.

Upon final hearing Mr. Foster further testified in open court (rec. pp. 133-135) that the Exploration Company, Limited, has never owned any properties in the United States in its own name. That the titles to the coal lands involved in this case were placed in the name of the witness as the representative in this country of the Exploration Company so as to enable him to deal with these properties, should the necessity to act arise, solely to expedite matters. The witness further testified that there were other cases where titles to properties in which the Exploration Company was interested were placed in his name; that the titles to the lands in question were not placed in his name for the purpose of concealing from the government, or any person, the interest the Exploration Company had in these lands; that he advertised the fact that the Exploration Company owned these lands; that he remembered the circumstance of Mr. McEniry calling on him and that on this occasion he told him he held this property in trust for the Exploration Company as their American representative, and that he would be very glad to give him all the facts concerning the matter.

Frank J. Bergin testified (rec. pp. 91-97) that he was a clerk in the General Land Office at Washington, D. C., and was familiar with the records kept in that office. That no information was received by the Department regarding the acquisition by the defendants, the Exploration Company, Limited, or Philip L. Foster, of title to the lands in question until the receipt of a special agent's report dated April, 1909. Upon the receipt of this report the same was transmitted to the Department of Justice with recommendation that suits be brought.

George F. Mikkelson testified (rec. pp. 97-8) that he was a clerk in the Department of Justice and has been for ten or twelve years. That he is in charge of the mail and file division and as such has custody of the records and files of the Department pertaining to suits to cancel patents to public lands. That the first communication received by his Department upon the subject of the lands in question came from the Secretary of the Interior, dated October 20, 1909, and recorded in the Department of Justice October 21, 1909. That he examined the files for the purpose of ascertaining whether any correspondence in regard to this suit or its institution, or matters involved therein was received prior to October 20, 1909, and did not find anything.

Rawlinson T. Bayliss testified (rec. pp. 98-119) that he resided in London; that he was the chairman of the Exploration Company, Limited; joined this company as mining adviser in 1897 and became its managing director eighteen months later and chairman of the company about 1901 or 1902. The witness then identified an agreement made between the Exploration Company, Limited, of 1896, and Charles A. Molson, which agreement is set forth in full in the record (rec. pp. 103-107), which agreement was offered in evidence. The witness then identified certain copies of accounts taken from the books of the Exploration Company, Limited, the material portions of which are set forth in the record (rec. pp. 107-116).

M. D. McEniry testified (rec. pp. 119-123) that he was Chief of the Denver Division of the General Land Office, with headquarters in Denver; which includes Colorado as well as other states. He was fa-

miliar with the present suit and that the transactions concerning the entries in question were first brought to his attention on October 24, 1908, when the Department at Washington sent instructions to investigate all the entries in the two townships in the western part of Colorado in which the lands involved in this suit are located; that pursuant to these instructions the witness assigned Special Agents Kelley and Anderson to proceed to the two townships in question and make the examination requested. At this time there was nothing in the instructions which invited the witness's attention to the particular lands in question, or to the defendant Exploration Company, Limited, or to Philip L. Foster, but to entirely different lands and parties. The information as to the lands herein involved did not come until long after the investigation started. In February, 1909, a report was made to the witness verbally and in a written memorandum that there were lands that had been acquired by people who appeared to be acting for people in Salt Lake City, whose names were Molson, Donohue and Davis. In the latter part of February, 1909, the first information came to him with regard to the connection of the Exploration Company, Limited, with these entries. The witness then made some inquiry as to this company and found that a Mr. Foster in New York was its American representative. The witness called on Mr. Foster in New York in March, 1909, at which time he admitted that he was the representative of the company and showed the witness his power of attorney. Foster informed him who the Exploration Company was, the character of the organization, and the business done by it. From the conversation which the witness had with Foster he

inferred that the titles to the lands in question were held by Foster in trust for the Exploration Company, Limited. The understanding of the witness from his conversation was that Foster was holding the lands in trust for the Exploration Company, and that he had no doubt as to that fact. The witness further testified that at no time prior to the initiation of the general investigation directed by the letter of October 24, 1908, had his office, or any one under him, or his predecessor, ever investigated the circumstances involving the particular entries in this case, or any of the facts in respect to these entries; that no effort had been made upon the part of the department to ascertain the facts until after the receipt of the letter of October 24, 1908; and that in so far as the conveyance of title after the original entries were made, covering the lands in suit, the department never made an examination of the records to ascertain who the record owners of the property were until October 24, 1908, and that his office and that of his predecessors never had had occasion prior to that time to run down the titles to these lands.

The deeds from the respective entrymen to Alexander Burrell were duly recorded in September or October, 1902 (rec. pp. 128-130).

The deeds from Alexander Burrell to Albert L. Smith were duly recorded December 1, 1902 (rec. pp. 131-132).

The deeds from Albert L. Smith to Philip L. Foster were duly recorded in April, 1906 (rec. p. 133).

All testimony of the plaintiff was introduced over the objection that the suit was barred by the statute (rec. pp. 135-136).

(3) *None of the allegations of the bill respecting concealment was established. All thereof were completely refuted.*

As already stated the defendants demurred to the bill, alleging the bar of the statute. On appeal the Court of Appeals reversed a decree sustaining the demurrer holding that the facts alleged by the bill in avoidance of the statute were sufficient (203 Fed.,387). Without in any wise conceding the correctness of that decision it is clear from a reading of the opinion of the Court of Appeals that the burden thereof was the sufficiency of the allegations respecting affirmative acts of concealment (203 Fed., on 388-389). The court repeatedly speaks of "concealed fraud" and of "a fraudulent concealment of the deceit."

But upon the trial the government did not attempt to prove its charges of concealment, and all pertinent testimony upon this subject was brought out in the cross-examination of the plaintiff's witnesses, or upon the direct examination of the defendants', and all of this testimony negatived the allegations. The District Court in its opinion upon final hearing reached this conclusion, saying (rec. p. 149; 225 Fed., 854, 856):

"The court also finds that the defendants did not actively conceal the facts which constitute the frauds in this case, by enjoining silence on the entrymen and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the government, but were only guilty of a passive concealment."

The bill charged (rec. p. 10) that a part of the unlawful scheme was that the alleged frauds should be concealed from the plaintiff to the end that it might

be delayed and defeated in any judicial proceedings. There was no proof whatsoever in support thereof.

It was further charged (rec. p. 10) that it was understood and agreed among the alleged conspirators that the true facts in the premises should be at all times concealed from the plaintiff, and each of the entrymen was enjoined, hired and paid so to do, and that the alleged conspirators and the entrymen at all times concealed and still conceal the facts from the plaintiff, and have obstructed, hindered and deceived the plaintiff in the ascertainment of the facts. Not only was there no testimony of this character, but as already stated each of the parties concerned testified that he or she never did conceal the facts or refuse to give them to any person making inquiry (Cartwright, p. 57; Baldwin, p. 58; Emma F. Nutter, p. 60; Anna Nutter, p. 60; Charles P. Nutter, p. 62; Stella M. Fairlamb, p. 64; John Davis, p. 74; Albert L. Smith, p. 80). Mr. Foster testified that he had frequently stated that the property belonged to the Exploration Company, and when the government's representative made inquiry of him in the spring of 1909 he gave him all of the facts known to the witness (rec. pp. 90, 134-135), and Mr. McEniry, the Chief of the Field Division of the Land Department, who interviewed Mr. Foster, practically confirmed his testimony (rec. pp. 120-123).

It was alleged that as a part of the unlawful and fraudulent scheme, and for the purpose of deceiving the plaintiff, title to the lands was conveyed first to Alexander Burrell, second to Smith, and then by Smith to Foster (rec. pp. 11-13). There is no evidence to show that such conveyances were made for any such purpose. Alexander Burrell claimed to have an interest in the property, and it was natural that the lands

should have been first conveyed to him by the entrymen (rec. pp. 84-85). Afterwards he was leaving the country to go to old Mexico, and for convenience he conveyed the lands to Mr. Smith, who was a banker at Helena, Montana (Alexander Burrell, p. 85; Smith, p. 80). In 1904 Mr. Foster became the American representative of the Exploration Company, Limited, and for this reason the property was conveyed to him without any bad motive whatsoever, but to enable him to act regarding the property and to dispose of it conveniently, as the Company itself held title to none of its interests in this country (rec. pp. 89-90, 134). It was charged in the bill that the defendant Foster had executed a declaration of trust to the defendant Company, but for the purpose of deceiving the plaintiff such instrument had been withheld from the official records (rec. p. 12). The undisputed evidence was that no such declaration of trust had ever been made, and that the only written evidence that the defendant Foster held such title for the Company was in his annual statements or reports to the corporation (rec. pp. 90, 135). It was charged that the defendants were assisted in the consummation of the alleged purpose of concealment by the remote situation of the lands (rec. p. 13), but there was no evidence that this circumstance entered into the case at all.

It was charged that by reason of these clandestine and surreptitious methods the plaintiff had been kept in ignorance of the true facts which had been concealed as alleged in the bill (rec. p. 13). Not only was there a total failure of proof in response to this allegation, but the government's own testimony showed that not until the expiration of six years from the dates of these patents did it attempt to investigate

at all, and when it instituted the same all the facts were promptly disclosed. The patents and all of the deeds, including those to Foster, had been placed on the records of Delta and Gunnison Counties, wherein the property is located, prior to or in April, 1906, and within four years from the dates of the patents. The government did not discover this simply because it never made any inquiry. The circumstances under which the facts were brought to the attention of the government are clearly shown by the testimony of plaintiff's witness McEniry, the Chief of the Field Division of the General Land Office (rec. pp. 119-123). The six years after the dates of the last patents now attacked expired October 16, 1908. On October 24, 1908, the field service at Washington sent instructions originating with Secretary Garfield to investigate all entries in certain townships in western Colorado, "whether the statute of limitations had run or not." (For correspondence, see pp. 91-94.) In pursuance of these instructions the witness McEniry assigned special agents to the work. This investigation did not originally concern the lands in question or the defendants, but arose out of certain charges against other corporations. But in the course of these general investigations the facts respecting the lands now involved were brought to the attention of the agents about February, 1909. Prior to that time there had been no effort upon the part of the department to ascertain the circumstances under which the entries in question were made, nor had the department ever examined the records to ascertain who was the record owner of the property, or to run down the titles to the land (rec. p. 123).

It is therefore patent that even though the defendant had done the numerous acts of concealment

charged (but not proven), the government was not in any wise misled, because it was never seeking for any information. It never approached any of the parties, either entrymen or others, until 1909 or thereafter, and when it did attempt to secure the facts they were promptly disclosed by the defendants as well as by the entrymen and others who were interviewed.

II.

SPECIFICATION OF ERRORS.

The assignments of error (rec. pp. 162-164) to be argued are comprehended within the following specification:

Under the allegations of the bill and also under the testimony the suit was barred by the statutes of the United States providing that "suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents" (Act March 3, 1891, 26 Stat. 1099, 1093, Comp. Stat. 1916, Sec. 5114; Act March 2, 1896, 29 Stat. 42, Comp. Stat. 1916, Sec. 4901). Therefore, the District Court should have dismissed the bill and the Court of Appeals of the Eighth Circuit should have reversed the decree of the District Court in favor of the plaintiff and directed the dismissal of the bill.

III.

ARGUMENT.

The bar of the statute raised first by demurrer to the bill and later by answer was avoided by the Court

of Appeals on the first appeal by a holding that where affirmative acts of concealment prevented the discovery of the alleged fraud, the six year period (expressly stated as running from the "date of the issuance" of the patent) did not commence until the discovery of the fraud (203 Fed. 387); and on the second appeal from the final decree that holding was extended "to cases of concealed fraud, whether active or passive" (235 Fed. 110, 111). In the last case the court said that "we are not asked to reverse our former decision holding that the cause of action was not barred," etc. Lest this court may infer from this that the present appellants conceded the soundness of the first opinion, we here say that any acquiescence therein on their part on the second appeal was under compulsion of the prior decision of the court in the same case; and we expressly stated that "this case must ultimately be determined by the Supreme Court, and therefore it is proper for us respectfully to say that we have not reconciled our minds to the logic used or the conclusions reached by this court in that opinion."

The first opinion of the Court of Appeals respecting the sufficiency of the bill we believe to be erroneous. The second opinion practically nullifies this positive and unconditional statute in all cases involving so-called "fraudulent" patents. As to all such cases, the court legislates. In lieu of the dates for the commencement of the limitation periods, prescribed by the statute, namely, "the passage of the act" (as to patents previously issued) and "the date of the issuance of such patents" (as to subsequent patents) there is substituted "the date of the discovery of the fraud" or possibly "the date whereon the fraud should have been discovered."

The opinions are founded upon the decision of this court in *Bailey* v. *Glover,* 21 Wall. 342, involving the construction of an ordinary statute of limitations, applicable to private individuals only, which required proceedings to be brought within a certain period "from the time the cause of action accrued." We are now for the first time before the tribunal which decided that case, and others of like character which followed it, confidently asserting that the lower courts have erroneously applied the principles of *Bailey* v. *Glover* to an entirely different statute, positive and inelastic in terms, and intended by the government to create an absolute bar to *its own* suits after the statutory period expired. We shall demonstrate that the legislation was intended to cover suits to annul all patents, void or voidable *for any reason,* including fraud, that this court has so held, that the foundation for the rule of *Bailey* v. *Glover* lies in a construction not applicable to this statute, and that the equitable doctrine of laches upon which that rule was predicated does not apply to the sovereign and has no place in the interpretation of a statute self-imposed by that sovereign, and designed not merely to bar its remedy but to destroy its right.

1. The Statute in Controversy.

The original statute was contained in Section 8 of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, and read:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued

shall only be brought within six years after the date of the issuance of such patents" (26 Stat. 1099; Comp. Stat. 1916, Sec. 5114).

This Section 8 was amended by another act of the same Congress, approved on the same day, wherein the exact language above quoted was repeated (26 Stat. 1093).

Later, by an act approved March 2, 1896, whose object was to extend the time limit for vacating certain patents issued prior to the act of March 3, 1891 (as more fully discussed in the next heading), it was provided as follows:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the fifty-first Congress and amendments thereto (*supra*) is extended accordingly as to patents herein referred to" (29 Stat. 42; Comp. Stat. 1916, Sec. 4901).

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2. The history of the origin and enactment of this act (and the associated act of 1896) indicates that it was intended to include patents secured through fraud, which might be actively concealed and which naturally would be passively concealed; and the failure of the congress to insert any excepting clause covering cases of concealed or unknown fraud indicates that no such exception was intended.

There are no recorded reports or debates attending the passage of the Act in 1891, but in connection

with the associated act of 1896, above quoted, there was extensive discussion of the 1891 act by the President, the officials of the Interior Department and the Congress, including a report from the Committee on Public Lands. Our position is that the act is so explicit in terms that they alone must be enforced. If it be not, then it is clear that resort may be had to reports of congressional committees to arrive at the true meaning (*McLean* v. *U. S.*, 226 U. S. 374, 380; *Caminetti* v. *U. S.*, 242 U. S. 470, 490); and the debates may also be referred to as a means of ascertaining the environment of the time and the history of the period (*Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 50). The government has heretofore suggested that as the proceedings to which we shall advert accompanied the passage of the 1896 statute, they cannot be utilized as throwing light upon the act of 1891. But these reports and debates primarily concerned the 1891 statute, which was then under review, and a modification or repeal of which was desired. The act of 1896 modified in some particulars (not here important) the 1891 act, and the case comes within the principle that "all statutes *in pari materia* are to be read and construed together, as if they formed parts of the same statute, and were enacted at the same time" (*Potter, Dwarris Stat.* 145; *U. S.* v. *Babbit*, 1 Black, 55, 60; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309). Indeed, this court has definitely held that the construction of a statute may be aided by committee reports accompanying subsequent legislation by Congress (*Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S. 492, 497).

Accompanying this brief, as an appendix, is a complete transcript (from Volume 28 of the Congressional Record) of the committee reports and debates

preceding the passage of the 1896 act. The bracketed numbers therein found identify the page of the original record; but for convenience our references will be to the paging of this appendix. We propose to refer to this record because if Congress had in mind, as we shall demonstrate it did, that patents induced by fraud (which necessarily must remain concealed for some period of time after their issuance) were within the scope not only of the proposed legislation but of an act which had been operative for five years and was then under discussion, and yet made no excepting provision respecting the time of the discovery of the fraud, but on the contrary continued the initial date of the six year period as the "date of the issuance" of the patent, then it is manifest that no such exception was intended by it or should be grafted upon the statute by the judicial department.

It will be observed that the act of 1891 referred not only to patents thereafter issued but also to patents theretofore issued, as to the latter providing that suits could only be brought within five years from the passage of the act, namely, on or before March 3, 1896. Shortly prior to that date the Commissioner of the General Land Office addressed a letter to the Secretary of Interior (App. pp. 23-26), referring to the statute *as one making no exceptions but applying to all patents,* and calling attention to the fact that the department had been engaged for a long time in adjusting railroad grants by patent and this work was of great magnitude and could not be concluded in time to institute any necessary actions within the five year period. He suggested that this time be extended. Thereupon the Secretary of Interior in turn addressed a letter to President Cleveland, saying (App. pp. 22-23):

"It is submitted, with due respect, that the legislation of Congress establishing this limitation against the Government is an innovation utterly inconsistent in my opinion with the theory of our institutions, and seems likely to result almost entirely in benefiting the interests of the corporations and adversely to those of the Government. From time immemorial it has been held that limitations did not bar the sovereign power from the assertion of a right. And in this country the highest judicial tribunals have uniformly held that laches was not to be imputed to the Government, which could only act through its agents. *But in this matter the Government is barred from righting the wrongs, whether intentional or inadvertent, perpetrated by those agents against the people at large,* by which much of the public property has been perverted to corporate uses."

President Cleveland thereupon sent a message to the Congress submitting these letters and inviting its attention to the necessity for prompt legislation in order to remove the limitation of time within which suits might be brought against patents issued prior to March 3, 1891, and said (App. p. 17):

"The Government should not be prevented from going into the courts *to right wrongs perpetrated by its agents or any other parties,* and by which much of the public domain may be diverted from the people at large to corporate uses.

In these circumstances, it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants."

It will be noted from the italicized portions of these communications that special reference was made therein to the hardships suffered by the government from "wrongs perpetrated by its agents or any other parties." Thus it appears that the federal officials

had in mind fraudulent patents, as well as those erroneously issued; they were speaking from five years' consideration of and experience with the act of 1891, and if it had been their intention that time should not run against such patents until the fraud was discovered certainly some suggestion for a modification of the statute would have been made. Not only was this not done but the proceedings in Congress indicate that the statute was construed to cover cases of fraud as well as all other instances where patents might be subject to attack.

Two bills were introduced in Congress early in 1896. One thereof provided that suits to vacate patents theretofore issued under a special grant (namely, those grants referred to in the communication of the President and his subordinates), should only be brought within five years from the passage of the act, and suits to vacate and annul patents thereafter issued should not be brought except within *ten* years after the date of the issuance of the patents (App. p. 2). An alternative measure, submitted by a committee minority, provided for the absolute repeal of the limitation statute (App. p. 13). This alternative was subsequently rejected and the debate revolved largely around the former. This bill was submitted to the House by a report of its Committee on Public Lands, through its chairman, Representative Lacey. Therein reference was made to an act of 1887, which provided for the cancellation of certain patents. Referring to proceedings under that act which resulted in the passage of the act of 1891, the report said (App. p. 5):

"These proceedings of necessity caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Gov-

ernment by correcting mistakes *and overturning fraudulent patents,* a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

In order that all of these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within six years after the date of the patent."

After referring to the message of the President, and the communications of the officials of the Department of Interior, the report continues (App. pp. 6-9):

"While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these patented grants should be given, it is also of the highest importance that the validity of the Government patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patent issued by the highest authority of the nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred."

* * * * * * * * * *

"We cannot agree with the President that public policy requires that there should be no limitation as against the Government in these cases."

* * * * * * * * * *

"The limitation may perfect titles in some instances *founded in more or less of fraud or mistake.* So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes."

Representatives McRae and Underwood submitted a minority report, accompanying their proposed bill to repeal the 1891 act, saying (App. p. 12):

"The undersigned * * * think that the Government should not be prevented from initiating proceedings to *correct the fraud or errors of its agents or grantees*, by which much of the public domain may be passed to corporations and syndicates."

These reports and the consideration of the bills resulted in spirited discussion in the House.

Representative McRae for the minority said (App. pp. 39-43):

"I do not believe that there should be a statute which would prevent the Government from bringing suit to correct mistakes *and frauds committed by its agents or otherwise.* * * *

It demonstrates the danger of all such legislation. It shows how easy it is to defeat justice *and promote fraud when there is a statute of limitation that validates the latter.* * * *

I insist that a sovereign government which is compelled to act through its agents ought to be at liberty at any time *to expose frauds perpetrated* or mistakes committed by those agents. * * * Many of the sharp, shrewd representatives of railroads will be able to cover up for a limited period *frauds of the greatest magnitude*, and thus dishonestly take from the settlers millions of acres of land which they ought to have and could get but *for the validation of such frauds* by laws like the one proposed."

And further (App. p. 67):

"I have already said I do not believe there should be any statute of limitations against the Government which will prevent the *uncarthing and exposure of frauds.*"

Representative Underwood, also opposing the bill, referred to the changing personnel of public officials and the danger that matters of grave importance might escape their attention, and said (App. p. 47):

"I know of no limitation that has ever been adopted by any State on any question except on the assumption that by reason of lapse of time the presumption had arisen that the title was perfected or the claim vested in the party exercising the right thereto.

Now, we know that today the Government of the United States claims that a large amount of these public land grants should be forfeited, that the railroad companies to whom they were made have received, *either through mistake or fraud*, a large quantity of public lands to which they were not entitled."

Representative Hepburn proposed an amendment, which was not adopted, but which provided for excepting from the operation of the provisions of the bill extending time for bringing suits, cases where "no fraud has been committed by the agent of the state or corporation or by the individual" (App. pp. 53, 75).

Mr. Lacey said, in referring to the Hepburn amendment (App. p. 83):

"I was trying to answer my friend from Illinois. The amendment amounts to this: That no patent shall be hereafter cancelled or annulled in behalf of the United States by suit *except in cases where actual fraud* is shown."

Without prolonging the discussion we call special attention to the colloquy between Representatives Neill and Lacey, indicating that the statute was in-

tended to include patents procured through fraud and to force the Government to make its investigations and commence its suits within the prescribed period. (App., p. 106.)

The bill as introduced was amended by reducing the time within which suits to annul patents thereafter issued might be instituted, from ten to six years, and as so amended was passed.

Manifestly, therefore, the Congress and those executive officials charged with the duty of observing the requirements of the acts of 1891 and 1896, understood that regardless of illegalities or irregularities, whether arising from fraud or otherwise, attending the securing of the patent, the same could not be challenged after the expiration of the period whose only prescribed commencement was either the *date of the act* or the date of the *issuance of the patent,* as the case might be. Representatives McRae and Underwood so construed the legislation and expressed vigorous dissent, but the entire proceedings reveal, as the fundamental position of the majority, that such a statute was required to stabilize titles in the western country so as to provide, as Mr. Justice Brewer afterwards said in the *Winona* case hereinafter cited, "that after a certain time the Government, the grantor therein (the patents), should not be heard to question them." It is a matter of common knowledge that such was the construction placed upon the act by the executive officers of the government for a period of nearly twenty years, and until the present theory was evolved and this suit commenced. We have cogent evidence to this effect in the correspondence between officials of the Departments of Justice and of the

Interior which preceded the investigation leading to the commencement of the suit at bar (rec. pp. 91-93). Such long-continued construction is an important factor for a court's consideration of an ambiguous law, to say nothing of one which is couched in such plain terms as the statute now before us (*Fairbank* v. *U. S.*, 181 U. S. 283, 310; *Houghton* v. *Payne*, 194 U. S. 88, 100; *U. S.* v. *Hermanos y Compania*, 209 U. S. 337, 339).

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3. The statute means what it in plain terms says. Construing it this court has held that the lapse of six years from "the date of the issuance" of the patent, without suit, takes away the right as well as the remedy; even void patents are thereby forever validated; a fortiori, patents merely voidable because of fraud can never thereafter be challenged. The only open question is whether the land was public land of the United States subject to sale and conveyance through the land department at the time the patent issued.

The language of the 1891 act seems too clear to permit a reasonable contention that it does not mean exactly what it says. There is no room for construction of the statute, and the sole function of the courts is to enforce it according to its terms (*Leffingwell* v. *Warren*, 2 Black, 599, 605; *U. S.* v. *McCord*, 233 U. S. 157, 163; *Caminetti* v. *U. S.*, 242 U. S. 470, 485). "The province of construction lies wholly within the domain of ambiguity" (*Hamilton* v. *Rathbone*, 175 U. S. 414, 421). "No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition

to the language of the statute" (*U. S.* v. *Goldenberg*, 168 U. S. 95, 103). "This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress" (*Dewey* v. *U. S.*, 178 U. S. 510, 521; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36).

This court has in three decisions, which were followed by the Circuit (District) Court for Colorado in dismissing the present bill (190 Fed. 405), definitely determined the purpose, meaning and effect of this identical law.

U. S. v. *Winona R. R. Co.*, 165 U. S. 463.
U. S. v. *Chandler-Dunbar Co.*, 209 U. S. 477.
Louisiana v. *Garfield*, 211 U. S. 70.

In the *Winona* case the United States filed its bill attacking a patent upon the ground that the lands had been wrongfully certified and patented, and should be restored to the public domain. The defendant relied upon that clause of the act of 1896, *supra*, relative to titles of bona fide purchasers, and the court discussed the provision at length. In addition, Mr. Justice Brewer, who wrote the opinion, quoted both acts of 1891 and 1896, construed them and gave them the broadest possible significance. Upon this subject he said (p. 476):

"In other words, it (the government) has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of the prescribed

time, be conclusive against the Government, and this notwithstanding any errors, irregularities or improper action of its officers therein.

Thus, in the act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the land department was, *what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title,* providing only that the land was public land of the United States and open to sale and conveyance through the land department. * * * It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them."

The *Chandler-Dunbar* case was instituted for the purpose of setting aside a patent to lands in the St. Mary River, it being claimed that the patent was void. The defendants relied upon the statute of 1891 and the decree of the Circuit Court was in their favor. Upon appeal to the Court of Appeals of the Sixth Circuit that court said that "the first question which we shall consider is whether the defendant *does not have title to this land by virtue of the statute of limitation of March 3, 1891*"; and in holding that it did and in replying to the Government's suggestion that the patent was absolutely void and of no legal effect said that "it is sufficient now to say that the statute in question is general and contains in itself no excep-

tion. When it speaks of vacating or annulling patents, of course it means the grants of title which the patents purport to make, and which the United States had lawful right to make." (*U. S.* v. *Chandler-Dunbar Co.*, 152 Fed. 25, 28-29).

The case was appealed to this court, wherein Mr. Justice Holmes, delivering its opinion, after quoting the statute, said (209 U. S. 450):

"The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it *or to validate it when made*, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell* v. *Warren*, 2 Black, 599.

In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, *generally are held to affect the right*, even if in terms only directed against the remedy. *Leffingwell* v. *Warren*, 2 Black, 599, 605; *Sharon* v. *Tucker*, 144 U. S. 533; *Davis* v. *Mills*, 194 U. S. 451, 457. *This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place.* See *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476."

In *Louisiana* v. *Garfield*, supra, this court approved its prior decision in the *Chandler-Dunbar* case, saying (211 U. S. 77):

"In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 477, it was decided that this act applied to patents even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy *but validated the patent.*"

The opinion of the Circuit Court of Appeals in the case at bar (203 Fed., on 391) summarily disposes of these decisions upon the ground that in none of them was a fraudulent patent involved. This is true. But in the *Winona* case Mr. Justice Brewer, in considering the meaning and effect of the statute, did refer to patents induced by fraud as being barred. In the *Chandler-Dunbar* case this court invoked the statute as forever validating a patent absolutely void—not merely voidable. It is incomprehensible why a statute which perfects a void patent should not be equally effective upon those merely voidable. In both cases this court held the statute to establish an *inflexible* rule of property, and this being true, it matters not that fraudulent patents were not directly involved.

In the case of *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, wherein patents to the Southern Pacific Company were alleged to have been fraudulently procured, this court apparently did not consider that the question of fraud in any wise affected the operation of the statute, for it said (p. 693):

"The patent here in question was issued July 10, 1894. Apparently, the Government never brought a bill to have it vacated or annulled, and the time for doing so apparently expired in 1900 or 1901. Acts, March 3, 1891, 26 Stat. 1093, c. 559; March 2, 1896, 29 Stat. 42, c. 39, Sec. 1; *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 450."

This act of Congress is not to be construed as an ordinary statute of limitation nor controlled by rules only applicable thereto. It is a mandatory direction that at the expiration of the six years from the date of the patent it becomes unassailable in any forum. And unless this be true is there any limitation at all? Suppose a patent was issued in 1897 through fraud, which was thereafter either actively or passively concealed until 1906 when it became known to the government. Could a suit now be instituted in this year (1918) to vacate and annul it? If the opinion of the Court of Appeals be sound such a suit may be maintained because "the date of the patent" in 1897 is to be forgotten and the year 1906 is to be substituted because in that year the fraud was discovered; and yet, as that was not the year of the date of the "issuance of the patent," we have no point from which to compute time.

In *Linn & Lane Timber Co.* v. *United States,* 236 U. S. 574, this statute was involved, but nothing therein decided was intended to uphold the government's contention in the case at bar, as is evidenced by the following language (p. 578):

"We now are not considering the effect of a fraudulent concealment of a cause of action. We are considering whether a man who knows that his title is bad and will be attacked can call into being a corporation which he owns, in order to save the property, make a deed to it, put the deed into his pocket, leave it unrecorded and, without the need of trusting even an accomplice, can keep it with perfect security until the statute has run, and then set up that his creature owns the land. We are deciding that if a secret transfer of wrongfully held land is made in this way for

the purpose of buaying the United States with the wrong person until the title shall be made good by time, service on the man thus put forward is sufficient to avoid the statute and the trick must fail."

In the present case there was not even a "fraudulent concealment of a cause of action." Under the view most favorable to the government, the one question is whether it may sit by until it accidentally discovers the true facts, though nothing be done meanwhile to cover them up, and then bring its suit regardless of the time intervening between the date of the patent and the date of discovering, whether this be ten years or fifty years.

In *Hoglund* v. *Lane, Secretary of Interior,* 44 App. D. C. 310, there was involved the effect of the following statutory provision which not only was contained in the same act of 1891 which prescribed the limitation upon patent annulment proceedings we are now considering, but immediately preceded, as the concluding sentence of Section 7 of the act, that limitation provision which is found in Section 8:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land * * * and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him" (26 Stat. 1095, 1099).

During the two years subsequent to the issuance of receiver's receipt to Hoglund, a deputy forest supervisor reported to the Department recommending that "this claim should be cancelled on account of non-

residence and lack of cultivation;" in effect charging Hoglund with fraudulent violations of the law. No action was taken upon this report during the two year period, but thereafter proceedings against the entry were ordered. Hoglund filed his petition for mandamus to compel the Secretary of the Interior to issue a patent. The Court of Appeals for the District of Columbia held that the mere report of the deputy forest commissioner was not a contest or protest within the meaning of the above law, with respect to which it said:

"It is urged by counsel for the Government that it is merely a statute of limitations, and the petitioner waived its benefit by failing to take timely advantage of it. It is not a mere statute of limitations which relates to and affects procedure, and could, therefore, be waived. *It is a statute of repose affecting and settling the title to real estate.* It establishes a limitation within which the Government or a private individual may by protest or contest challenge the title of an entryman. *When the time expires the right ceases.*"

The case was appealed to this court, where the judgment was affirmed (*Lane* v. *Hoglund*, 244 U. S. 174), the court saying:

"The statute makes it very plain that if at the expiration of two years from the date of the Receiver's final receipt there is no 'pending contest or protest' against the entry *its validity no longer may be called in question*—in the words of the act, 'the entryman shall be entitled to a patent * * * and the same shall be issued to him.' *The purpose to fix his right* and to command its recognition is obvious." (p. 177.)

And again:

"Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course. Thus in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent." (p. 181.)

Taking into consideration that the phrase "two years from the date of the issuance of the receiver's receipt" is found in a sentence of the act of 1891 which immediately precedes the phrase now involved, namely, "six years after the date of the issuance of such patents," the *Hoglund* case has added importance. There can be no escape from the conclusion that each of these sections is, as the Court of Appeals for the District of Columbia held with respect to Section 7, "a statute of repose affecting and settling the title to real estate. * * * When the time expires the right ceases"—language which this court, in effect, repeated.

4. The principle of Bailey v. Glover and kindred cases, to the effect that where the statute prescribes a limit after "the cause of action accrues" for the institution of the suit, time does not begin to run until the discovery of the fraud, particularly concealed fraud, is based on the theory that until such discovery the cause of action does not accrue. This court and the lower federal courts have so held, and it is evidenced by statutory enactments. The principle does not apply to statutes such as the one now in question.

(a) The English cases are predicated upon the fact that Statute 21 James I applied solely to actions at law, and therefore the chancery courts might ingraft exceptions in equity cases.

The first English statute of limitations was enacted in 1623 (3 Stat. p. 100, 21 James I, Chapter 16), and it limited the time for the institution of certain *actions at law* therein enumerated to six years "next after the cause of such actions or suit and not after."

That statute only applied, *by its very terms*, to actions at law. Courts of chancery were therefore at liberty to make such exceptions as the circumstances of the case justified. In *Bond* v. *Hopkins*, 1 Sch. & Lef. 413, 428, 431, a suit in equity, Lord Redesdale, in 1802, considered the statute and said:

"The statute of limitations does not apply in terms to proceedings in Courts of Equity; it applies to particular actions at Common law * * *. * * * But it is contended that the bar arising from the statute of limitations ought not to be removed, because the enactment of the statute is positive.

The answer is, the positive enactment has nothing to do with the case. The question is not, whether it shall operate in a case provided for by the positive enactment of the statute—but whether it shall operate in a case not provided for by the words of the act, and to which the act can apply only so far as it governs decisions in Courts of Equity; that is, whether it shall prevent a Court of Equity doing justice according to good conscience, where the equitable title is not barred by lapse of time, although the legal title is so barred."

The same chancellor, in *Hovenden* v. *Lord Annesley*, 2 Sch & Lef. 607, 630, again announced the same principle, and in the later case of *Ecclesiastical Commissioners* v. *Northeastern Railway Co.*, L. R. Ch. Div., Vol. 4, pp. 845, 859, it was stated by Vice-Chancellor Malins:

"Now we all know that before the 3 & 4 Will. 4, c. 27, *the Statute of Limitations was not binding in Courts of Equity*, but as Lord Redesdale expresses it in Hovenden v. Lord Annesley (2), where there is no fraud or any particular circumstances, Courts of Equity act not merely by analogy, but in obedience to the statute. Therefore, where there is no fraud, that which would be binding in a Court of Law would be also binding in a Court of Equity, * * *. But equity will remove the legal bar proceeding from lapse of time as it would any other legal advantage if sought to be used unconscientiously. That is all the relation this statute has or ought to have on proceedings in equity."

And in *Kane* v. *Bloodgood*, 7 John. Ch. 88, 113, Chancellor Kent, referring to the English cases said that "though the courts of equity *were not within the words of the statutes*, the time prescribed by them was

adopted by analogy as a fit and just period for a bar in equity of analogous claims."

We may, therefore, lay out of view the English cases.

(b) Of course, the statute now before us, by its very terms, affects suits in equity, because none other than an equity proceeding could be invoked for the purpose of annulling a patent. Furthermore, it is exclusively confined to "suits by the United States."

(c) The "cause of action does not accrue until the discovery of the fraud," is the principle upon which the federal courts predicate their construction of the ordinary statute of limitations.

In *Bailey* v. *Glover*, it was, we concede, established that where a statute prescribed that a suit must be brought within a certain period after the "cause of action accrues," time does not begin, in a case involving fraud, particularly if it be actively concealed, until that fraud is discovered.

But that case and all of the national and state decisions which have followed it involved statutes prescribing that suits must be brought within a certain time "after the cause of action accrues." It is, therefore, important that we seek the reason for the rule, in order that these authorities may be differentiated by one argument equally applicable to all. We find the first clear statement of this reason in *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 634, wherein Lord Redesdale in applying the statute of 1623, by analogy, to a suit in equity, held that in cases of fraud the reason why the statute should not operate was because until discovery "the title to avoid it (the fraud) does not completely arise."

This same foundation for the principle has been clearly and unmistakably stated by the federal courts, including this court. The case of *Sherwood* v. *Sutton*, 5 Mason, 143, decided by Mr. Justice Story in 1828, has been largely relied upon by the government in this litigation. There is nothing in the language of that opinion which in any wise militates against the view we are presenting. It is true the court held that where the statute prescribes a limit of time for the commencement of suits "after the cause of action accrues" in cases of fraud that time does not begin until the fraud is or should be discovered. The reason is not definitely determined in that case, although the doctrine that the cause does not accrue until discovery was in the court's mind when it said:

"I do not stop to inquire, whether it is to be deemed an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud. The authorities present some diversity of judgment in this respect. Perhaps the true mode of considering it would be, that it is a continuing fraud during the whole period of its concealment, thus knitting it to the original wrong."

Twenty-four years thereafter the case of *Carr* v. *Hilton*, 1 Curtis, 230, was decided by Mr. Justice Curtis, sitting at circuit, and with his usual lucidity of statement he said:

"The settled statutes of limitation do not run, in cases of fraud while it is secret. Some difference of opinion has existed, respecting the grounds for this rule; but, in my judgment, the most reasonable and sensible ground is, that, substantially, the title to avoid the transaction does not arise until the fraud

is known. This is the practical and just view, and to this I assent; and hold that when the cause of action is a fraud, the action does not accrue while its cause is concealed; and this interpretation I must consider to have been within the intention of the legislature, when it used the same language, which had acquired a settled meaning to that effect."

In *Norris* v. *Haggin*, 28 Fed. 275, Judge Sawyer considering a statute of limitations of California which provided that in cases of fraud "the cause of action in such case (shall) not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud" said (p. 280):

"The English statute of limitations, from which the American statutes were originally derived, applied only to actions at law, and did not embrace this provision; and, in providing for actions for relief on the ground of fraud, the legislature carried into the provision the doctrine, as established in courts of equity, that the cause of action should not be deemed to have accrued until 'the discovery of the facts constituting the fraud.'"

Then followed, in 1887, the decision in *Kirby* v. *Lake Shore Railroad*, 120 U. S. 130, which was the first opinion of this court wherein the reason for the principle was stated. *Bailey* v. *Glover*, and several cases which followed it, applied the rule without expressing its basis. But the *Kirby* case removed all doubt upon the subject. The question arose therein whether the suit came within a certain statute of New York, providing that in actions for relief on the ground of fraud the cause of action should not be deemed to have accrued until the discovery of the fraud. The court held, or assumed, that the action

was not of the character covered by this statute, but, notwithstanding such fact, the general principle of courts of equity accorded with the statute and extended itself to the suit under consideration. In so holding, Mr. Justice Harlan said (p. 138):

"It is an inflexible rule in those courts (namely, those of the United States), when applying the general limitation prescribed in cases like this, *to regard the cause of action as having accrued at the time the fraud was or should have been discovered,* and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud."

Later, in *Goodridge* v. *Union Pacific Railway,* 35 Fed. 35, Judge Brewer, for the Circuit Court for Colorado, said (p. 37):

"It is further insisted that, where there is concealment of a wrong, that the time during which such concealment runs is not to be included within the statutes. *The cause of action dates from the time the wrong is discovered.*"

We have no intention of compiling the many state authorities to the same effect. But among the cases cited in the foot-note of *Bailey* v. *Glover,* in the official edition and apparently a part of the opinion, is *First Mass. Turnpike Corporation* vs. *Field,* 3 Mass. 201, wherein, on page 207, Chief Justice Parsons said:

"The delay of bringing suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action."

In the light of these decisions there is no merit in the government's contention, approved by the courts below in the case at bar, that no distinction can be made between a limitation dating from the accrual of the cause of action and one dating from the issuance of the patent. The view so asserted seems to be that both limitations are identical, as both starting points are the same. This assumption of identity of the initial dates rejects the only ground upon which *Bailey* v. *Glover* and other similar cases can be logically sustained, and indicates that the courts below must have taken those cases as authority for the arbitrary suspension of the operation of an unambiguous statute. While, in technical strictness, both starting points are probably the same, the fact remains that the courts have not considered them to be the same but have held the "date of the accrual of the cause of action" to be dependent upon when that cause was discovered. This is not illogical and does no violence to the language of the statute involved in *Bailey* v. *Glover*. But it is not logical or fairly possible to say in our case that the date of the discovery of the fraud is the date of the "passage of this act" or the date of the "issuance of such patent."

(d) This same principle is fortified by many statutes, which, adopting it, have provided that in the case of fraud "the cause of action shall not be deemed to have accrued until the discovery thereof."

Thus, an act of Parliament in 1833 provided:

"And be it further enacted, That in every case of a concealed Fraud the Right of any Person to bring a Suit in Equity for the Recovery of any Land or Rent of which he, or any person through whom he claims,

may have been deprived by such Fraud, *shall be deemed to have first accrued* at and not before the Time at which such Fraud shall or with reasonable Diligence might have been first known or Discovered." (Stat. 3 & 4 William IV, Chap. 27, Sec. 26, XIII Stat. Part I, p. 75.)

This was the statute referred to by Vice-Chancellor Malins in *Ecclesiastical Commissioners* v. *Northeastern Ry. Co.* (*supra*, p. 46), wherein he says that prior to its enactment acts of limitation were not binding on courts of equity.

In the appendix to 2 Wood on Limitations, fourth edition (1916), beginning on page 1567, will be found the various statutes of limitations of the several states. An examination thereof discloses that at least the following states have legislated that in cases of fraud (in some cases, concealed fraud only), the cause of action *does not accrue* until its discovery:

Arizona, California, Connecticut, Florida, Iowa, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Utah, Washington, Wisconsin and Wyoming.

In the first appeal to the Court of Appeals in the case at bar we referred to these same statutory provisions as furnishing cogent evidence of the basis for the equitable principle. The court turned the argument against us, saying that "the truth is that the rule in regard to concealed fraud is so instinct with justice and common sense that it has been adopted by statute in the following states"—and then inserted the same list of states which we had presented (203 Fed. on 391). We submit that the court entirely mis-

conceived the effect of these statutory provisions and the purpose for which we cited them. They are only valuable as establishing that for which we contend, namely, that the equitable principle adopted in *Bailey* v. *Glover* is founded upon the theory that the date of the "accrual of the cause of action" is the date of the discovery of the fraud.

(e) The preceding discussion demonstrates that the application of the "equitable principle" to statutes such as the one involved in Bailey v. Glover is not the creation of a judicial exception from the terms of the statute—it is merely by way of judicial interpretation.

(f) The principle does not apply to a statute such as the one in question, where the language is not only explicit but inflexible.

There are but few statutes considered by the courts similar in terms to the acts of 1891 and 1896. But almost invariably when such statutes have been involved it has been held that the doctrine applicable to the ordinary provisions may not be invoked where time runs from a specific date. Certain decisions of the national courts in bankruptcy cases present in particularly clear juxtaposition the two classes of statutes and the manifestly different principles applicable to them, and as they were all decided after *Bailey* v. *Glover*, and distinguish that authority, we take the liberty of presenting them at some length. Like *Bailey* v. *Glover*, they involved the National Bankruptcy Law, then operative; but, unlike that

case, they were called upon to construe another limitation section of the act.

The section considered in *Bailey* v. *Glover* provided that no suit should be maintained by or against an assignee or by or against any person claiming an adverse interest touching the property involved in bankruptcy proceedings "unless the same shall be brought within two years from the time *the cause of action accrued* for or against such assignee." (14 Stat. p. 518, Sec. 2.)

Section 34 of the same act contained the following provision:

"That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, *at any time within two years after the date thereof*, apply to the court which granted it to set aside and annul the same." (14 Stat., p. 533.)

These two sections were subsequently embraced, in substantially the same language, in sections 5057 and 5120, respectively, of the Revised Statutes.

Bailey v. *Glover* was decided in 1874. Thereafter the last-quoted section 34 was presented for consideration to several of the national courts and their construction thereof was in the light of that case, which was put forward, at the bar, as controlling authority to the effect that where concealment of the fraud attendant upon the discharge of the bankrupt was shown, the statute, notwithstanding its positive terms, would not run. All the courts held otherwise.

Pickett v. *McGavick*, 14 N. B. R. 236, 19 Fed.

Cas. No. 11,126, p. 588, was the first of these cases, the decision being by District Judge Parker in the Western District of Arkansas. We quote a portion only of his opinion upon the question:

"The court has no hesitation in saying, if it be true, as alleged in the petition, that the defendant was guilty of the act charged against him, that it presents a most flagrant and outrageous case of fraud, and one which this court will, if it can, aid in uncovering. But, bad as this case may be, we must treat it legally, and if a remedy is wanting under the law, it is not with the court (which does not make laws, but construes and administers those already made), but with the law-making power. Section 34 of the bankrupt law provides that any creditor of the bankrupt may, at any time within two years after the date of the discharge, apply to the court to set aside and annul the same, on the ground that it was fraudulently obtained.

"When does the cause of action first accrue in a case under this section? From the date of the discharge, or from the discovery of the fraud? Under the ordinary statutes of limitations, which provide that suit shall be brought in a specified time after the cause of action accrues, it has become a fixed rule, that, where an action is based on fraud, the statute does not commence to run until the discovery of the fraud, or until it has become known to the party injured by the fraud. Because it can well be said that a cause of action does not accrue until the party could avail himself of a remedy to enforce that cause of action, and he could not do so until the cause of action was discovered or became known to him. But this section is different from the ordinary statute of limitations. This language is entirely different. It positively provides that the discharge may be contested at any time within two years after the date thereof,

on the ground that it was fraudulently obtained. That time (the date) must, then, in my judgment, be taken as the time when the cause of action accrues."

In re Brown, 19 N. B. R. 312, 4 Fed. Cas. No. 1983, p. 338, was decided by the District Court for the Southern District of New York in 1879, and the opinion upon this point by District Judge Choate was, in part, as follows:

"It is insisted that this (section 34) is to be construed like a statute of limitation, as being subject to the implied exception or condition that in case the cause of action is fraudulently concealed, the time of the accruing thereof shall be deemed to be the time of the discovery of the right to sue. It has been held that the two years' limitation from the time of the accruing of the cause of action, in case of suits by and against assignees in bankruptcy, is to be so construed. Bailey v. Glover, 21 Wall. * * * It appears to me that the language used, 'two years after the date thereof,' is not capable of that enlargement by construction that has been found possible in statutes of limitation generally.

"The words used are positive and explicit. They differ from the words usually defining a limitation of suits, and I think they were designedly used to fix an absolute period of time when the question of the validity of the discharge would be set at rest, and when the debtor and those again trading with him might safely treat his discharge from his old debts as final."

Matter of Herzig, 15 Abb. New Cases, 179, was decided in 1885 by the District Court for the Southern District of New York. In the opinion District Judge Brown said:

"In my judgment, the time specified is a limitation upon the authority of the court; and such an application cannot be entertained after two years has expired. The language of Section 5057 is not analogous. That section authorizes an action to be brought 'within two years from the time when the cause of action accrued.'

"Under this section in cases of concealed fraud, it is held that the cause of action does not accrue until the discovery of the fraud or reasonable means of knowledge of it (Bailey v. Glover, 21 Wall. 342; Rosenthal v. Walker, 111 U. S. 185, 190). Section 5120, however, is so different in its language as not to admit of any enlargement by similar latitude of construction. * * * If the discharge may be avoided after two years, on the ground that the fraud was not discovered, then there is no fixed period whatever after which any new business or new credits could be entered upon with safety."

In *Alexander H. Mall & Co.* v. *Ullrich,* 37 Fed. 653, the District Court for Ohio said, with respect to the same statute:

"Section 5120 of the Revised Statutes (bankrupt law) provided an absolute bar, where the petition was not filed within two years from the date of the discharge. The limitation is not in any way controlled by the discovery of the fraud."

The Court of Appeals realizing the force of these decisions attempted to avoid them by the mere statement that the statute therein under consideration, namely, that any creditor of a bankrupt seeking to contest a discharge on the ground that it was fraudulently obtained may "at any time within two years after the date thereof" apply to the court for its annulment, said that "such statutes stand in the same

position as statutes relating to the time in which appeals may be taken, and the case is not applicable to the question now before us" (203 Fed., on 392). This statement is not persuasive or particularly important. All statutes of limitation have that quality. Furthermore, the court below failed to observe that the decisions we have cited were not founded upon any such formal distinction, but planted themselves squarely upon the difference in language employed by the two sections of the bankruptcy law in prescribing the initial dates for the limitation periods.

The case of *Kinder* v. *Scharff*, 231 U. S. 517, lends, we believe, increased importance to the bankruptcy decisions just quoted. That was a suit brought by a trustee in bankruptcy to recover land alleged to have been fraudulently conveyed by the bankrupt. The defendant pleaded that the action was barred under section 11d of the present bankruptcy act (30 Stat. 554, 549), which provides that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."

The case turned on another point, and therefore the question now raised was not directly passed upon. However, this court used some language relative to the statute which indicates that such a law as we are now considering cannot be construed as in *Bailey* v. *Glover*. It says (231 U. S. 520, 521):

"But it is obvious that there must be some limits if the promise of repose after two years in Sec. 11d is not to be a mirage. * * * Therefore, apart from the difference between the statutes considered there and here, cases like *Bailey* v. *Glover*, 21 Wall. 342, and *Truer* v. *Clews*, 115 U. S. 528, where the cause of action for fraud was concealed, do not apply."

(g) The provision in the statute relative to patents issued before its passage makes it impossible, in such instances, to apply the argument that a statute of limitations may run in certain cases from the discovery of the fraud. The same construction must be given to the entire statute.

The act in question applies not only to patents issued after its passage but also to those issued *before* that time. As to the latter the act provides that suits "shall *only* be brought *within five years from the passage of this act.*" In these cases Congress took the position that it was immaterial when the patents issued or when the cause of action accrued. The act was passed March 3, 1891. Patents of various ages were outstanding and Congress did not attempt to fix a period of limitation in those cases running from the date of the issuance of the patents. It properly enacted that as to all such patents, whether one or twenty years old, and no matter what the nature of the cause of action, no suit should be brought after March 3, 1896. Clearly this was a positive declaration that regardless of any questions of fraud or otherwise, the government had to bring its suits before March 3, 1896. Suppose that in 1910 the government had brought a suit to annul a patent issued in 1888, and had charged that it had just discovered certain concealed fraud. Would it not be said at once that the bar of the statute was complete? There could be no doubt as to the passage of the act, and none as to the date of the five year expiration. If a court in such a case were to say that the suit could be brought after March 3, 1896, where would it find any such authority? If it said that the cause of action accrued upon the discovery of the fraud, or that the bar of the stat-

ute did not run until then, what could be said as to when the limitation period would expire, and as to the proper time to bring the action?

The entire statute treats both classes from the same point of view, and establishes definite terminations for both limitation periods. With this in mind, and with the premise that the intention of Congress as to frauds must be considered the same, regardless of the particular patent, we are brought clearly to the position that the same policy was intended to be applicable to all cases. Congress cannot be held to have intended to say that the policy requiring the government to sue within a definite time meant that if fraud and its concealment attached to a patent issued March 4, 1891, the government should be able to defeat the express language of the statute by asserting the equitable rule invoked by the government and the court below; but that if it attached to a patent issued March 2, 1891, the government should not have that right. There cannot be two rules under the same statute.

(h) Congress was presumptively aware of the rulings that the "cause of action does not accrue until the discovery of the fraud"; and in selecting another and inflexible date from which to measure the period of limitation intended to depart from this principle.

The *Glover* case was decided in 1874. *Kirby* v. *Lake Shore Railroad*, which held that the "cause of action" did not "accrue" until the discovery of the fraud, was decided in 1887. All of the other decisions to which we have referred antedated the passage of

the act of 1891. Congress is presumed to have known of these decisions and the principles upon which they were founded. If it had intended to impress the same rule upon the present statute it would have continued the phraseology of the acts previously construed, or, if not, it would have inserted express legislative direction to the same effect. It did neither and "an omission of the words implied an omission of the purpose" (*Pirie* v. *Chicago T. & T. Co.*, 182 U. S. 438, 448). The legislative history of the act discloses that Congress appreciated that it would specifically limit the time for bringing actions to a certain date calculated from another certain date, and that this would preclude actions after a definite time, no matter whether fraud or its concealment were involved or not. Congress had in mind the fact that the settlement of a new country depended upon the definiteness in time as a basis for the assertion of adverse claims to lands as to which it had parted with title. It knew that the doctrine of *nullum tempus occurrit regi* was absolutely inconsistent with such settlement, and it knew that anything short of specific limitations meant the possible clouding of land titles and consequent embarrassment to settlement.

The question before Congress was whether it should adopt such a statute of limitations as would leave government grants subject to indefinite repudiation, or whether it should say that after a specific time those grants should be unassailable. If it adopted the first theory the grantees and their purchasers might be compelled to preserve the evidence of good faith of the entries indefinitely, in order to repudiate any suggestions of fraud which the government might at any time conclude it had discovered. If it adopted the

second theory the government was given a specific number of years to interview the entrymen and to examine into all the details of the entries so as to determine whether it desired to bring a suit. The concealment of an original fraud was not, and is not, a cause of action in itself. The right of the government to recover would turn, in any event, upon the original fraud; and Congress knew that with the records of the entry before it the government, if it desired, could in reasonable probability within six years ascertain the facts and determine whether it would sue. What then did Congress do? It enacted a statute which, instead of providing that suits should be brought within a certain time from the discovery of fraud, or within a certain time from the accrual of the cause of action, specifically determined, as a matter of mathematical accuracy and based upon an exact starting point within the government's knowledge, the exact date beyond which no suit should be brought. True, this legislation might in some instances validate illegal entries and patents, but this was deemed to be a far less serious evil than those which would attend a limitation which would be so indefinite and indeterminable as to amount to no limitation at all.

5. The equitable principles announced in Bailey v. Glover related solely to statutes affecting private litigants. The Acts of 1891 and 1896 created self-imposed barriers against suits by the Government only, respecting which the equitable rule now invoked had never been, and cannot be, applied. The statutes neither continued nor repealed any such rule because none had ever existed.

From what precedes it cannot be disputed that the acts of 1891 and 1896 were self-imposed by the government for the purpose of composing titles and placing beyond any attack patents which were not assailed within the prescribed period though originally void or voidable. The proceedings in the Congress, this court's opinions in the *Winona* and *Chandler-Dunbar* cases, and above all the plain terms of the acts, put this beyond question.

Statutes such as the one involved in the *Glover* case "were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent frauds the means by which it is made successful and secure" *(Bailey* v. *Glover,* 21 Wall., 342, 349).

In its decision on the first appeal in the present case much is made of this reasoning as equally applicable to the act of 1891 (203 Fed., 389, 391).

Here, however, we are dealing with statutes having but one object, namely, the ultimate security against question of solemn muniments of title to public land. To apply the purpose of an ordinary statute of limitations, so clearly expressed by this court in the language just quoted, to the acts of 1891 and 1896 is to assume that the government's intention was to prevent itself from perpetrating frauds on its own citizens. These acts have another and broader meaning and purpose, namely, the creation of a general feeling of security and confidence in government land titles and the removal, after the lapse of the reasonable periods prescribed by the statutes, of the fear of possible question as to such titles.

But there are further and conclusive reasons why the equitable principle applied in the *Glover* case to the construction of ordinary statutes of limitations imposed upon individuals, cannot be grafted upon the acts of 1891 and 1896. Those reasons may be summarized by the mere statement that the principles themselves have never inhered in limitations imposed by the state upon its own suits. Prior to the act of 1891 there was no statute preventing the United States from bringing suit to cancel a patent whenever it saw fit. Not only was there no statutory restraint, but even gross neglect or laches could not be pleaded against the government (*U. S.* v. *Beebe*, 127 U. S., 338, 344). On the other hand, from the earliest times courts of equity have denied relief to those who have been negligent in bringing their suits (*Smith* v. *Clay*, 3 Bro. C. C., 646). Therefore while the right of the government to sue for the cancellation of fraudulent conveyances was unrestrained, similar suits by

private persons were limited by a comprehensive code of equitable rules constituting the doctrine of laches or by definite statutes. It is important to note this distinction because the government now seeks to apply part of this equitable code, always heretofore limited to controversies between and statutes affecting the individual, to qualify the definite terms of an entirely different law—a self-imposed restriction against questioning its own grants. This distinction has been entirely overlooked by the court below, which said on the first appeal (203 Fed., 387, 389):

"The real question before us is whether the enactment of the statute repealed the equitable rule enforced by courts of equity, that, when the object of the suit is to obtain relief against fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it."

The "equitable principle" thus extended to this statute is but one of the many constituent principles of the doctrine of equitable laches, applicable only to private suits not otherwise limited by definite statutes.

Prior to as well as after the act of 21 James I, in 1623 (*supra*, p. 45), the controlling consideration determining whether a plaintiff should be given relief in a court of equity on an apparently stale demand was whether he, the *plaintiff*, had been diligent in seeking relief, and this regardless of the enormity of the defendant's fraud. That this is true and that equity imposed this duty of diligence upon the plaintiff, requiring him both to allege and to prove specifically that he had not been guilty of delay is so clear

as to require merely a citation of a few decisions of this court which so hold (*Stearns* v. *Page*, 7 How., 819, 829; *Wood* v. *Carpenter*, 101 U. S., 135, 143; *Foster* v. *Mansfield, etc. Co.*, 146 U. S., 88, 99; *Pearsall* v. *Smith*, 149 U. S., 231, 236). There is no equitable rule permitting the maintenance of a stale suit merely because of the defendant's fraud. That element is relevant only upon the question of whether the plaintiff has been negligent.

But we have shown that laches—which lies at the foundation of this principle—cannot be attributed to the government, and therefore the whole "equitable principle" becomes inapplicable to a statute directed by that government to its own suits. In other words, that principle cannot be harmonized with the statute unless the government is exempted from all requirements of diligence, which equity has imposed upon individuals in the assertion of their demands.

This modification of the principle in favor of the state, but not of the individual who may be sued by it, cannot, of course, be tolerated. If the enactment of the 1891 statute carried with it the implied adoption of equitable rules concerning concealment or lack of discovery which were the outgrowth of controversies solely between individuals, those rules must have been adopted in their entirety, and if they were so adopted Congress unwittingly overturned the rule that the negligence of its agents cannot be imputed to the government. For every inquiry concerning fraudulent concealment in a government suit must involve the concurrent determination as to whether the government knew or ought to have known of its cause of action sooner; for means of knowledge are

equivalent to actual knowledge, that is, knowledge of facts which would put an ordinarily prudent man upon inquiry is equivalent to knowledge (*Wood* v. *Carpenter*, 101 U. S., 129, 141). It cannot be assumed that such a situation was intended, certainly in the face of the plain terms of the act of 1891. Who is "the United States" when it comes to the question of acquiring knowledge of a fraud? Can it be said that one officer or agent may know of it, but that the government does not know? If so, who must know? Is it the local land officer, the Commissioner of the General Land Office, its special agents, or the Secretary of the Interior; or must it appear that the President himself has knowledge before the government can be said to have discovered a fraud? Even eliminating the element of negligence, the immense practical difficulty (never, as yet, solved by the courts) of determining what is notice to or knowledge by the government must have appealed to the framers of the act and induced them to fix that definite limitation which is clearly expressed therein. If the equitable rule applied by the courts below in the case at bar is applied to suits by the government in an altered form consistent with immunity of the government from laches, the statutes in question are practically repealed, since suits to cancel patents might be brought at any distant time. The government could postpone the bar of the statute at will by simply postponing the acquisition of full knowledge until it was ready to file its suit. This was the very thing Congress attempted to avoid.

The embarrassments and difficulties that must result from the attempt to read into the act of 1891

something that does not belong there, are well illustrated by two recent decisions which endeavored to apply the act in the form in which it had been judicially qualified by the Courts of Appeals of the Eighth and Ninth Circuits in this case and the *Linn and Lane* case (196 Fed., 593; 203 Fed., 394).

The first of these is *U. S.* v. *Lee Wilson & Co.*, 214 Fed., 630, decided by the District Court for the Eastern District of Arkansas in 1914. The defendant pleaded the act of 1891, and the court, after saying that the statute was not involved because the government was not attempting to vacate a patent, proceeded to dispose of the defense on the merits, saying:

"As the fraud, even if we assume mistake, of the original survey was not discovered by the department of the government charged by law with the management of the public lands until December, 1908, when the Secretary of the Interior made his findings as hereinbefore set out, and the motion for review of that decision was not disposed of until February 27, 1909, the statute did not begin to run until that time."

The hearing in 1908 referred to in the foregoing excerpt was a contest before the land department in which evidence was received on the very issues presented to the court (p. 638). The suit was filed in 1911. A letter written in 1902 by the Secretary of the Interior to the Commissioner of the General Land Office (p. 649) showed that prior to that time a special agent of the government had made an investigation developing substantially the facts upon which the fraudulent character of the survey in question was determined.

The court disposed of this report by saying that "such a communication, made by a subordinate employe of the department, who is not even an officer of the United States * * * without authority from the department, and merely expressing his own opinion, without having taken any evidence or made any personal investigation upon which his opinion is based, can hardly be said to be notice to the government, which can only act through its officers, and for that reason is not chargeable with notice as strictly as an individual" (p. 649).

Notwithstanding this, the letter of the Secretary of the Interior written in 1902, and quoted at page 649 of the court's opinion, seems to indicate that the Secretary himself got very full information from this agent's report. Yet the court finds that neither this nor the hearing and decision by the Secretary of the Interior in 1908 was enough, and that the statute did not begin to run until an application for a rehearing had been disposed of in 1909 (p. 648).

Such a decision entirely destroys the operation of the statute. In the usual case no occasion would arise for a rehearing or an executive finding of facts or it could be withheld at the will of the government until it was ready to sue. The entire discussion of the statute by that court is an attempt to reconcile the rule asserted by the Court of Appeals in the case at bar with the rule that the government is immune from the charge of negligence or imputed knowledge. The failure of the attempt is due to the basic incompatibility of the two rules.

In marked contrast with this decision is that of the District Court for the Western District of Washington in *U. S.* v. *Puget Sound Traction Co.*, 215 Fed.

436, decided about the same time. This suit was started in 1914 to cancel a mineral patent issued in 1904. The bill charged that the land was not mineral and that the patent had been fraudulently obtained for power site purposes, and the delay in bringing suit was sought to be excused by pleading fraud and concealment by the defendants so that the government remained in ignorance of the real facts until 1910. On a motion for a more specific statement as to why the bill was not barred, the court held the allegations insufficient because there were no facts alleged "from which the court would be justified in concluding that the government was not negligent or was not lacking in diligence in failing to make the discovery within the statutory period" (p. 439). It said (p. 441):

"The statute here in question was enacted for the very purpose of binding the government. By its very terms it compels the government to suffer by the negligence of its agents or officials. If a patent is obtained fraudulently, and knowledge of the fraud is possessed by the government officials within the statutory period, and yet they negligently fail to bring an action to set it aside until after the period has expired, can we say that such negligence is not imputable to the government? To do so would be to deny the existence or binding force of the statute and to accomplish the repeal of a congressional enactment by the process of judicial construction. The statute is absolute in its terms. It says that actions to annul patents shall only be brought within six years of the date of their issuance. The equitable rule of concealed fraud, qualifying the absolute terms of the statute, was *ingrafted upon it by judicial construction.* It was, however, the rule as developed, defined, and expounded by courts of equitable jurisdiction, which was thus imported into the statute, and not an emas-

culated and mutilated remnant of that rule; a comprehensive legal principle, not a legal paradox. Equity recognizes no such doctrine as that the statute of limitations will be tolled by mere ignorance unaccompanied by a showing of due diligence or concealment of fraud. How, then, can it be read into the statute as a rule of equity?"

If the statutes of 1891 and 1896 are to be applied other than according to their strict letter, we must take one of the two divergent courses presented in these decisions. In the former, the court, accepting, as it was required to do, the decision of the lower court in the present case, chose to apply the equitable principle borrowed from private suits in such a way as to deprive it of its essential character through the elimination of all inquiry as to the plaintiff's negligence. In the latter, the court likewise bound by the *Linn and Lane* decision in the Ninth Circuit Court of Appeals, applied the borrowed equitable rule according to its meaning and thereby surprised the government by placing it in a position it had never occupied before. But if the government desires to borrow this "equitable principle" from private suits in order to avoid the effect of its own delay, it must be prepared to accept all of its incidents.

The truth is that Congress did not intend or authorize either of these situations. It recognized the fundamental difference between public and private suits and knew that existing rules controlling the latter were unsuited to government suits. The statutes were passed to accomplish this object. Congress did not desire to secure to dishonest patentees the fruits of their frauds. It thought, however, that in the vast majority of cases six years would be long enough to detect such frauds. It also knew that the lapse of

time had its dangers for honest patentees, and that innocent acts often bore the aspect of fraud as time dimmed or destroyed the evidence of their true character. It therefore fixed a definite limitation, believing that the ultimate certainty of titles would more than compensate such occasional losses as might result from successful concealment.

In the preceding differentiation between statutes of limitation affecting individuals and the Act of 1891, we have (with their permission) appropriated as our own much of the excellent discussion found in the brief of Joseph Paxton Blair and Charles R. Lewers, *amici curiae,* filed in the *Linn and Lane* case (236 U. S. 574) and which contains a more extended argument of the subject.

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6. This case does not involve any question of concealment of a cause of action.

The fact just stated has not only been demonstrated by reference to the record (*supra,* pp. 20-24), but was found by the trial court on final hearing (225 Fed. 854, 856):

"The court also finds that the defendants did not actively conceal the facts which constitute the frauds in this case, by enjoining silence on the entrymen and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the government, but were only guilty of a passive concealment."

In the light most favorable to the government the case simply presents the question whether the statute applies to so-called "dummy entry" cases where the only unlawful acts were anterior to the dates of the patents. We do not mean by this to imply that even

active concealment and deceit subsequent to the issuance of the patent would toll the statute. The preceding discussion is intended to demonstrate that it would not. But we wish to emphasize that no such element is here involved, and the only question is whether the statute is tolled by reason only of those facts preceding the patent which constitute the evidence upon which it is sought to be vacated.

In other words does mere silence after the patent is issued in such cases operate to delay the running of time? Must the patentee actually notify the Government of the irregularities inhering in the entry and until that time may the United States take no steps whatsoever to investigate the circumstances?

In the instant case the proof shows that although all deeds had been duly recorded, and although all the facts would have been completely disclosed within a very brief period after investigation started, the full six years had expired before the slightest inquiry was instituted by the United States.

We submit, therefore, that even though the Act of 1891 provided that suits to annul patents could only be brought within six years after the cause of action accrued, and even though such language were construed to mean that the cause of action did not accrue until discovery, the Government could not succeed in the case at bar. *"Concealment by mere silence is not enough.* There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same in effect as knowledge itself" (*Wood* v. *Carpenter,* 101 U. S. 135, 143; *Felix* v. *Patrick,* 145 U. S. 317, 331; *Pearsall* v. *Smith,* 149 U. S. 231, 236).

7. Some additional comments upon an underlying error of the lower courts in this case.

At appropriate places throughout the preceding argument we have commented upon and answered most of the propositions upon which the lower courts, particularly the Court of Appeals, based their decisions. As to these we shall say nothing further. In conclusion, however, we believe that the underlying fault in those opinions arose out of the emphasis which was sought to be placed upon the unconscionable effect of the application of the statute according to its plain terms. In their desire to accomplish what they believed to be substantial justice the courts lost sight both of the fundamental purpose that actuated Congress in passing the statute and of the language of the act itself. They sought to construe the statute as they believed the policy of the government should be, and in so doing laid entirely out of view the fundamental principle that the "court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress" (*Dewey* v. *U. S.*, 178 U. S., 510, 521), and also the similar rule that "the court cannot add an exception based on equitable grounds when Congress forebore to make such an exception" (*L. & N. R. R.* v. *Mottley*, 219 U. S., 467, 479).

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8. The decrees of the District Court and Court of Appeals should be reversed with directions to dismiss the bill.

HENRY MCALLISTER, JR.,
GEORGE E. TRALLES,
Solicitors for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 277.

EXPLORATION COMPANY, LIMITED, AND PHILIP L. FOSTER,
APPELLANTS,
VS.
THE UNITED STATES OF AMERICA,
APPELLEE.

On Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF APPELLANTS.

(APPENDIX.)

(Being Committee Reports and Debates of Congress Concerning Act of March 2, 1896—Statute of Limitations.)

(From Volume 28, Congressional Record. Original page numbers appear in brackets.)

[1760] HOUSE OF REPRESENTATIVES,
Saturday, February 15, 1896.

EXTENSION OF TIME IN WHICH SUITS MAY BE BROUGHT TO VACATE AND ANNUL PATENTS UPON PUBLIC LANDS.

MR. LACEY. Mr. Speaker, I desire to present a privileged report from the Committee on Public Lands.

The bill was read, as follows:

"A bill to provide for the extension of the time within which suits may be brought to vacate and annul patents upon public lands, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within ten years after the date of the issuance of such patents. But no [1761] patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

"SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be less than minimum Government price thereof, nor more than the amount paid by the purchaser to the original grantee of the United States, and the title of such claimant shall stand confirmed. An adverse decision by the Secre-

tary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title and shall render a decree in behalf of the United States for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party of such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections 3 and 4 of chapter 376 of the acts of the second session of the Forty-ninth Congress.

"SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or

that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land, as hereinbefore specified."

Amendments recommended by the committee were read, as follows:

"Line 4 of section 1, after the words 'under a,' insert the words 'railroad, Mexican, Spanish, or other.'

"Also, after the word 'patents,' in lines 8 and 9, insert 'and the limitation of section 8 of chapter 561 of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to.'"

MR. LACEY. Mr. Speaker, I ask for the present consideration of this bill.

The report (by Mr. Lacey) was read, as follows:

"On the 17th day of January, 1896, the President sent to Congress a message in relation to the expiration of the limitation provided in the act of March 3, 1891. Under the act of March 3, 1887 (24 Stat. L., 256), the Interior Department was directed to adjust all the various railway and other land grants as speedily as practicable, and whenever it was ascertained that lands had been erroneously patented the law provided that actions should be brought to cancel the same.

"Provisions are embraced in the act of 1887 to protect settlers and purchasers by giving them pref-

erential rights in case of the cancellation of their patents.

"These proceedings of necessity caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Government by correcting mistakes and overturning fraudulent patents, a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

"In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within six years after the date of the patent.

"The Commissioner of the Land Office on the 18th of December, 1895, addressed a communication to the Secretary of the Interior, suggesting an extension of time by an amendment to the act of 1891. The Secretary of the Interior communicated with the President upon the subject, recommending the repeal of the limitation altogether. Thereupon the President sent a message on the subject to Congress, asking for a repeal of section 8 of the act of March 3, 1891.

"We will set out in an appendix to this report the message and other communications above referred to.

"The Committee on the Public Lands have patiently examined the whole subject and invited before

them all persons interested in the question, as also the Assistant Attorney-General for the Department of the Interior and the Commissioner of the General Land Office.

"There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioner of the General Land Office was of the opinion that it would require ten years more to adjust the grant under the act of 1887, and therefore thought the limitation should be extended ten years.

"In the adjustment of these grants it is not practicable for more than from two to four clerks in the General Land Office to work at one time without having duplicates made of certain lists or records. With this small force the adjustment has slowly proceeded for the last nine years, and over 60,000,000 acres still remain unadjusted. It appears, however, that by active diligence about 12,000,000 acres have been adjusted in the last year. At this rate the work could be completed in five years more.

"But even if it could not be done with the present force, the committee are of the opinion that duplicate copies of lists and documents or records ought to be made to expedite this work, and that the time ought not to be extended more than five years.

"While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these patented grants should be given, it is also of the highest importance that the validity of the Government patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or

purchasers of these lands may know that the Government patent issued by the highest authority of the nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

"Under existing law, and in the absence of any limitation, a settler may buy a home upon one of these grants, and after occupying it for years, under the faith of a patent regularly issued and recorded, find himself made a party to a long, vexatious, and expensive litigation, and in the end be permitted to buy the land again from the Government or to enter it under the homestead laws.

"That such a thing may occur for a reasonable time is perhaps the necessary consequence of fraud and mistake in patents, but that such a condition should be kept open without limit is an intolerable blemish upon the titles purporting to come from the Government. If a private individual sells and conveys lands, and they pass into innocent hands, the purchaser is protected as against his grantor, and time will protect him against all comers. But as against the United States, in the absence of a limitation law, he is never secure and may be subjected to annoyance and expense and possible loss of his land at any time.

"A private individual may have obtained a patent for a homestead, tree claim, or preemption claim, and after selling the same the purchaser, who has bought upon the faith of the Government patent, may be harassed by proceedings in the courts hundreds of miles away, with a possible appeal to the expensive forms of the court of appeals, and the

still more expensive and clogged tribunal of the United States Supreme Court.

"To remedy these defects the act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not been found practicable to adjust them within so short a time, we think that a bill giving five years' longer limitation ought to pass, but we do not believe that this extension of time ought to affect bona fide purchasers; that as to them the limitation of the act of 1891 ought to operate as a final bar when the time first limited shall expire.

"But as to the original patentees, no great injustice will be done to them by extending the time five years longer, and within that time we think that the grants can be all adjusted. The shortness of this time, it is true, may put the Interior Department to some inconvenience, and it may involve some extra expense for clerical work, but the importance of bringing to an end all disputes upon the part of the Government as against its own patent titles is so evident as to need but little argument in its support.

"Your committee have prepared and presented a bill which will carry out the purposes outlined in this report, and we recommend its passage.

"We can not agree with the President that public policy requires that there should be no limitation as against the Government in these cases.

"We have had unpleasant object lessons in many of the Spanish grants, whose limits are as elastic and uncertain as the Venezuelan boundary. The presence of these disputed titles has cast a blight

over some of our most beautiful lands for more than a generation. There should be some time fixed when such a condition shall cease to exist.

"The limitation may perfect titles in some instances founded in more or less of fraud or mistake. So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes.

"Most of the States of the Union have adopted statutes which will bind the States themselves. Such statutes have been found to work well. To require the sovereign power to proceed in a reasonable time if it wishes to avoid or nullify its own acts is a just provision in behalf of its individual citizens. The absence of limitation excuses delays on the part of officials, and that which may be done at any time, however distant in the future, is much less likely to be attended to in the present.

"We are informed that as to some of these land grants the greater part that has been patented has been sold to third persons. That was the very purpose of the land grants. It was not intended that these grants in aid of public improvements should be tied up indefinitely and withheld from settlement.

"It was the theory of the projectors of such enterprises that these lands would be brought into markets by the building of railways and that the railway companies would be interested in selling them on long time at low prices and at low rates of interest to actual settlers who would furnish a carrying business for the new lines. It ought not to be the policy of the Government to harass or annoy one of these settlers by any litigation whatever.

"The policy of making railway grants has been long since abandoned. The adjustment of those made should proceed with all reasonable speed, so that the transactions may be closed.

"The railway companies themselves have encouraged delay by failing to procure their patents, in order to avoid local taxation. One of the purposes of the act of 1891 was to encourage the patenting of such lands, so that they might become subject to such taxation, and that their sale and settlement might be encouraged.

"The bill which the committee presents with this report is as follows:

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within ten years after the date of the issuance of such patents. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

"'Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the

corporation, company, person, or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be less than minimum Government price thereof, nor more than the amount paid by the purchaser to the original grantee of the United States, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party of such suit (and who has not submitted his claim to the Secretary of the Interior), may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option as prescribed in sections 3 and 4 of chapter 376 of the acts of the second session of the Forty-ninth Congress.

"'Sec. 3. If at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser, or are bona fide pur-

chasers of any patented or certified land, by deed, or contract, or otherwise from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until [1762] such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the patent was issued or certification was made, for the value of the land as hereinbefore specified.'

VIEWS OF THE MINORITY.

"The undersigned, members of the Committee on the Public Lands, think that the Government should not be prevented from initiating proceedings to correct the fraud or errors of its agents or grantees, by which much of the public domain may be passed to corporations and syndicates. We propose the following substitute for the bill reported by the committee.

THOS. C. MCRAE.
O. W. UNDERWOOD.

"A bill to repeal section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891; the act entitled 'An act to amend section 8 of an act approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891,' and the act entitled 'An act to extend the provisions of section 8 of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, concerning prosecutions for cutting timber on public lands, to Wyoming, New Mexico, and Arizona,' approved February 13, 1893, be, and the same are hereby repealed."

APPENDIX

"We here set out the President's message and the departmental correspondence upon which it was based:

[House Document No. 151, Fifty-fourth Congress, first session.]

MESSAGE OF THE PRESIDENT OF THE UNITED STATES.

To the Congress:

"I desire to invite attention to the necessity for prompt legislation in order to remove the limitation of the time within which suits may be brought by the Government to annul unlawful or unauthorized grants of public lands.

"By the act of March 3, 1887 (24 Stats., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted, and it is provided, if it shall appear, upon the completion of such adjustment or sooner, that the lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented, and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute in the proper courts necessary proceedings to restore title to said lands to the United States. The demands made under this act have been numerous, and in some cases have resulted in the reinvestment of title to the lands in the United States upon demand, but in most cases the demand has been refused and suits have been necessary.

"The work of adjustment has been unavoidably slow. The said act makes provision for the reinstatement of entries erroneously canceled on account of railroad withdrawals, and, upon certain conditions, provides for the confirmation of titles derived by purchase from the companies of lands shown to be excepted from the grants. It contemplates a disposition of every tract described by the granting act, situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those

tracts shown to be erroneously certified, and the determination for what tracts lost to the grant indemnity is to be allowed.

"It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads, the grants for which conflict or overlap, be finally disposed of, so that a proper disposition of the land can be shown in the adjustment. While adjustments have proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers, of the United States, and the railroad companies, and while to this end the force of adjusters has been largely augmented in the General Land Office, many of the grants yet remain unadjusted.

"In some of the grants, notably the corporation grants, the lack of surveys up to the present time made the completion of the work impossible.

"Decisions rendered by the Interior Department in numerous conflicts have been carried into the courts. The construction of the Interior Department has generally been sustained when final determination has been reached, but many of the cases are still pending in the courts, not yet having been decided. Some of these cases, while involving immediately the title to only one particular tract, will, when decided, furnish a rule of construction to control the disposition of the title to thousands of acres of other lands in the same situation. Until the courts pass upon these questions final adjustments can not be made.

"By section 8 of the act of March 3, 1891 (26 Stats., 1099), it is expressly enacted that suits by

the United States to vacate and annul any patent theretofore issued 'shall only be brought within five years from the passage of this act.' This period of five years will expire on the 3d of March, 1896. Of course no suit by the United States to secure the cancellation of a patent in this class of cases after that date would be effective. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal, in accordance with the provisions of the act of March 3, 1887. Before the expiration of this period the statute would bar the right of recovery by the Government, and the benefits of anticipated favorable decisions of the courts would be lost so far as they might determine the character and disposition of grants similar to those directly involved in pending cases.

"It will be readily seen that if this act of limitations is to remain on the statute books the portion of the adjustment act referred to would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by law.

"Legislation establishing limitations against the right of the Government to sue is an innovation not entirely consistent with the general history of the rights of the Government, for it has uniformly been held that time did not bar the sovereign power from the assertion of a right.

"The early adjudications of the Land Department construed the grants with a degree of liberality to-

ward the grantees which later decisions of the courts and of the Department have not sustained. It seems clear that the further progress of adjustments will develop facts and transactions in connection with these land grants which ought to be the subjects of legal examination and scrutiny before they are allowed to become final and conclusive. The Government should not be prevented from going into the courts to right wrongs perpetrated by its agents or any other parties, and by which much of the public domain may be diverted from the people at large to corporate uses.

"In these circumstances, it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully urge upon Congress speedy action to the end suggested, so that the adjustment of these grants may proceed without the interposition of a bar, through lapse of time, against the right of recovery by the Government in proper cases.

"GROVER CLEVELAND.

"EXECUTIVE MANSION, *January 17, 1896.*

"DEPARTMENT OF THE INTERIOR,

"*Washington, December 27, 1895.*

"SIR: I beg leave to invite your attention to the provisions of section 8 of the act of March 3, 1891 (26 Stat. L., 1099), where it is enacted that suits by the United States to vacate and annul any pat-

ents theretofore issued 'shall only be brought within five years from the passage of this act,' which, in my opinion and that of the Commissioner of the General Land Office, ought to be repealed. In order that you may fully understand the situation, I beg to submit the following observations:

"By the act of March 3, 1887 (24 Stat. L., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted; and it is provided if it shall appear, upon the completion of such adjustment, or sooner, that lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented; and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute, in the proper courts, necessary proceedings to restore title to said lands to the United States.

"The said act also makes provision for the reinstatement of entries erroneously canceled on account of railroad withdrawals, and, upon certain conditions, for the confirmation of titles derived by purchase of the companies of lands shown to be excepted from the grants.

"The demands made under this act have been numerous, and in some cases have resulted in the reinvestment of title to the land in the United States; but in most cases the demand has been re-

fused or no response made thereto, and suits have been necessary.

"The work of adjustment contemplates a disposition of every tract described by the granting act situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those tracts shown to be erroneously certified, and the determination for what tracts lost to the grant indemnity is allowable.

"It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads the grants for which conflict or overlap, be finally disposed of so that a proper disposition of the land can be shown in the adjustment.

"In some of the grants, notably the corporation grants, the lack of surveys renders an immediate adjustment impossible.

"Decisions have been made by this Department in the matter of numerous conflicts and the cases have been carried into the courts.

"So far as the same have reached final determination they have generally been favorable to the construction of this Department, but many are still pending in the courts.

"Under the provisions of the act of March 3, 1887 (supra), the adjustment of the railroad land grants has proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers, of the United States, and the railroad companies. To this end the force of adjusters has been largely aug-

mented in the General Land Office; and when deemed advantageous, the hours of work have been prolonged even until late at night. And when any such adjustment has been submitted to the Secretary for consideration and approval, as is required in every instance, prompt action has always been taken, such work being treated as 'special.'

"Notwithstanding these extraordinary efforts, many of the grants yet remain unadjusted, though much and very rapid progress has been made. But from the nature of the many difficulties and complications connected with the work, the recital of which would occupy too much space herein, it has been, and is, both a moral and physical impossibility to close the adjustment of these grants as speedily as desired. Some of the cases now pending in the courts involve actually the title to only one particular tract, while a decision upon the questions therein would control the disposition of the title to thousands of acres of other lands in the same category.

"When these important matters will be decided it is almost impossible to say, but certainly not before March 3, 1896. Should these questions be decided favorable to the Government, the favorable decision could not necessarily be made to inure to its benefit as to the other lands the title to which was not by actual description embraced in said decision, because, by section 8 of the act of March 3, 1891 (26 Stat. L., 1099), it is expressly enacted that suits by the United States to vacate and annul any patent theretofore issued 'shall only be brought within five years from the passage of this act.' This period of five years will expire on the 3d of March, 1896.

"Of course, no suit by the United States to secure the cancellation of a patent in this class of cases after that date would amount to anything. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal in accordance with the provisions of the act of March 3, 1887 (supra), before the expiration of which time the statute would bar the right of recovery by the Government.

"Recent decisions of the Supreme Court have greatly affected the previous dispositions made under railroad grants, but will facilitate the progress of the adjustment of grants, notably, Northern Pacific Railroad Company vs. Bardin (154 U. S., 288); Northern Pacific Railroad Company vs. Bardon (145 U. S., 535); Whitney vs. Taylor (158 U. S., 85), and United States vs. St. Paul and Sioux City Railroad (159 U. S., 349).

"It will be readily seen that if this act of limitations is to remain on the statute books the portion of the adjustment act of 1887, before cited, would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by power of law. By this denial to the Government of the right to go into court and ascertain its rights the railroad companies would profit very largely, as it is a well-known fact, capable of abundant substantiation by the records of the Land Office, that the early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees which, by

later decisions, is declared not to have been warranted by law.

"Should, therefore, the statute of limitations make them secure in the enjoyment of the lands thus obtained, it is entirely inconsistent with experience to suppose for a moment they would, on an impotent demand, voluntarily surrender anything that the law secures them the enjoyment of.

"It is submitted, with due respect, that the legislation of Congress establishing this limitation against the Government is an innovation utterly inconsistent [1763] in my opinion with the theory of our institutions, and seems likely to result almost entirely in benefiting the interests of the corporations and adversely to those of the Government. From time immemorial it has been held that limitations did not bar the sovereign power from the assertion of a right. And in this country the highest judicial tribunals have uniformly held that laches was not to be imputed to the Government, which could only act through its agents. But in this matter the Government is barred from righting the wrongs, whether intentional or inadvertent, perpetrated by those agents against the people at large, by which much of the public property has been perverted to corporate uses.

"Statutes of limitations are regarded favorably because of the repose they give against stale claims, the presumption being that after the lapse of a reasonable time they have been asserted and adjusted or waived.

"But this presumption does not arise where, from circumstances, no proper opportunity has been afforded for the assertion of the claims, as, for instance, during the existence of the disabilities of

minority, coverture, or the like. And certainly such presumption can not arise in the matter of these land grants, where, as is abundantly shown, from the very nature of the case, the rights of the Government are ascertainable with so much difficulty.

"Under these circumstances it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully request that you urge upon Congress to take speedy action, as suggested, that there may be no delay in the adjustment of these grants and no bar, by lapse of time, against the right of recovery by the Government in a proper case.

"Herewith is transmitted copy of the letter of the Commissioner of the General Land Office to me on this subject. Your attention is invited to the fact that in recommending the repeal of the existing law he suggests the re-enactment of limitations of ten years within which suits are to be brought to secure cancellation of patents. I do not entirely concur in this suggestion of the Commissioner, but think, for reasons herein stated, it would be best to repeal the limitations absolutely, and leave the law as it existed prior to the passage of said act of March 3, 1891.

"Very respectfully, HOKE SMITH, *Secretary.*

"The PRESIDENT.

"DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

"Washington, D. C., December 18, 1895.

"Sir: On March 3, 1891, an act of Congress entitled 'An act to repeal the timber-culture laws, and

for other purposes,' was approved by the President. (26 Stat., 1095.) Section 8 of said act provided, among other things, 'that suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issue of such patents.' And by another act, approved the same day (26 Stat. L., 1093), entitled 'An act to amend section 8 of an act approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes,"' the same proviso was enacted. It will be observed that this section makes no exception, but applies to all patents.

"By act of March 3, 1887 (24 Stat. L., 256), directions were given for the adjustment of all grants by Congress to aid in the construction of railroads, and for the recovery by the United States of title to lands which from any cause have been erroneously certified or patented under such grants, and said act requires that the adjustments be made in accordance with the rulings of the United States Supreme Court. Therefore, as conveyances under these grants date as far back as 1850 and were made under various court and departmental rulings, it is not surprising that many of said conveyances have been and will be found, under the construction now given such grants by the Supreme Court, to have been erroneous.

"A number of these grants have been examined with a view to their adjustment, and rules have been laid to show cause why suits should not be instituted for recovery of title in some cases, and demands for reconveyance have been made in others, but very

few have been finally adjusted and closed, not more than a dozen; and most of these examinations, nearly all in fact, were made prior to the rulings of the United States Supreme Court in the cases of Mary Bardon vs. Northern Pacific Railroad (145 U. S., 535) and Whitney vs. Taylor (158 U. S., 85), which so change the previous rulings of the court, as construed by this Department, as to make necessary a re-examination of all railroad land grants, excepting the few finally closed and some half dozen examined since the decision in the case of Whitney vs. Taylor, above referred to. The Department so held in its letters of July 18, 1895, in the case of the St. Louis, Iron Mountain and Southern Railway Company, and September 5, 1895, in the case of the Burlington and Missouri River Railroad Company of Iowa.

"There are 79 land-grant railroads and 7 land-grant wagon roads.

"Under the provisions of section 8 of the act of March 3, 1891, as originally passed and amended as aforesaid, the time within which the United States can legally bring suit for the recovery of lands erroneously patented prior to March 3, 1891, will expire March 3, 1896, unless an extension be made by Congress.

"The work of adjusting these grants is one of great magnitude, and the division of the office charged with its execution is also charged with the consideration and determination of all questions relating to or arising out of conflicts between grants by Congress to aid in the construction of railroads, wagon roads, canals, and river improvements and rights of way over the public lands for railroads, canals, ditches,

and reservoirs, and its current work must be kept up. It is also charged with the administration of the grant of desert lands to certain States.

"It is clear, therefore, that the time within which the United States may bring suit for recovery of land erroneously certified or patented under these grants must be extended or that the interests of the Government, and in many instances those of private citizens, must suffer. I have accordingly the honor to suggest that Congress be asked to extend such time ten years, or until March 3, 1906, for lands patented prior to March 3, 1891, and ten years from date of patent for lands patented subsequent thereto.

"Very respectfully,

"S. W. LAMOREUX, *Commissioner.*

"The SECRETARY OF THE INTERIOR."

THE SPEAKER. The question is on agreeing to the amendments recommended by the committee.

MR. LOUD. Mr. Speaker, I make the point of order that this is not a privileged matter. I would like to hear from the gentleman from Iowa on that point.

MR. LACEY. It is undoubtedly a privileged report from the Committee on Public Lands under paragraph 57 of Rule XI, which provides that the Committee on Public Lands shall have the privilege of reporting at any time "bills for the forfeiture of land grants in the public lands, and bills for the reservation of the public lands for the benefit of actual and bona fide settlers."

Now, Mr. Speaker, this bill is a bill for the reservation of the public lands for actual and bona fide

settlers, lands that have been erroneously patented to somebody else. It provides means by which that erroneous patenting may be recalled and the lands may be reserved for the benefit of bona fide settlers, and it comes clearly within the paragraph of the rule I have cited.

MR. LOUD. I submit, Mr. Speaker, that this bill merely extends the time in which suits may be begun, and there is a question in my mind as to whether it does come within the provision of the rule. This is a bill which I am rather inclined to think will provoke a good deal of discussion on this floor, and the question I now raise is whether it comes within the rule as privileged. It is a bill which merely extends the time within which suits may be begun.

MR. LACEY. I will say to the gentleman that it is a matter of great importance to his State.

MR. LOUD. It is of great importance to my State. It opens up one of the greatest questions in California; it opens up all the old Mexican titles which we have heretofore regarded as settled. I doubt very much whether it is a privileged matter.

MR. LACEY. It does not open up that question, Mr. Speaker; the question is now open. This bill merely amends a limitation law which is now in force, the act of 1890, and is in response to the message of the President sent here on the 17th of last month. The limitation expires on the 3d day of next month, and if there is any question about the bill being privileged there certainly should be no question about its consideration at the earliest practicable time.

MR. LOUD. I will not object to its consideration. The question I raise is as to whether it is privileged.

MR. PICKLER. Oh, well; let it go.

THE SPEAKER. If the point of order is insisted upon, the Chair would like to understand how the bill does come within the provisions of the rule.

MR. LACEY. In this way. The land grants have to be adjusted under the act of 1887. That act required that the Secretary of the Interior should, as speedily as possible, adjust all of these land grants and determine the lands, if any, which had been patented erroneously, such as lands lying beyond the limits of the grants. Then the act of 1891 was passed, limiting actions to cancel such patents to five years, and this bill now proposes to extend that time five years more as to everybody except bona fide settlers, so that the lands which will be affected will be lands that will be reclaimed by the United States to be reserved for the benefit of the public.

This bill, therefore, reserves for public settlement erroneously patented lands, and that brings it within the privilege of the rule. If it does not, of course the bill is not privileged. It opens the lands also to settlement, which brings it within the privilege.

MR. LOUD. I admit that that may be contingent; but the object is simply to extend the time within which certain suits may be begun, which makes the mass of titles, which are now substantially perfected, for the next five years or more still under supervision by the Government and subject to question.

THE SPEAKER. The Chair thinks that that provision has always had a liberal construction, and will decide that it is a privileged matter.

MR. LOUD. Then I raise the further point of order that this must have its further consideration in the Committee of the Whole.

MR. LACEY. It does not involve the expenditure of any public money.

MR. LOUD. It relates to the public lands generally, however.

MR. LACEY. It does not involve the giving away of the public lands, but the reclaiming of public lands wrongfully patented, and I do not think it is subject to that point.

THE SPEAKER. On what ground does the gentleman from California claim that this must go to the Committee of the Whole?

MR. LOUD. Because it provides ultimately for the disposition of the public lands.

THE SPEAKER. In what way?

MR. LOUD. Well, it takes land now in the possession of certain parties back to the Government, which is an ultimate disposition of the lands.

THE SPEAKER. But that seems to be not an appropriation of money, but an acquisition of money.

MR. LOUD. I am not speaking of the money portion, but that it is ultimately a disposition of the public lands, which I assume involves a question that must be considered in Committee of the Whole.

MR. BOWERS. If I may be allowed a minute, as one of the committee—

THE SPEAKER. Before the gentleman proceeds the Chair will overrule the point of order.

MR. BOWERS. Then I have nothing further to say on the subject at this time.

MR. MCRAE. Now, Mr. Speaker, I desire to offer a substitute for the bill. [1764]

MR. LACEY. I yield to the gentleman from Arkansas to offer a substitute for the bill, so that both may be considered together.

MR. MCRAE. I offer the following as a substitute:

The Clerk read as follows:

"A bill to repeal section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891.

"Be it enacted, etc., That section 8 of an act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March 3, 1891; the act entitled 'An act to amend section 8 of an act approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891,' and the act entitled 'An act to extend the provisions of section 8 of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891, concerning prosecutions for cutting timber on public lands, to Wyoming, New Mexico, and Arizona,' approved February 13, 1893, be and the same are hereby, repealed."

MR. LACEY. Mr. Speaker, the proposed substitute offered by the gentleman from Arkansas sounds very complex to hear it read, but is in fact a very simple matter. The act of 1891, March 3, providing a limitation against the Government in bringing suit to cancel the patents to public lands previously granted to anybody, required that all such suits should be begun within five years. This proposed substitute repeals that section without any limitation whatever, but continues the power on the part of the Government hereafter at any time to bring actions to cancel patents either to railroad companies or others for any lands that have been granted heretofore.

The committee bill, however, has been prepared with great care in response to the message of the

President read to this House on the 17th day of last January. The President calls the attention of Congress to the fact that that limitation in the act of 1891 will expire on the 3d day of March, 1896, and that there are 60,000,000 acres of land grants yet to be adjusted in order to determine what patents, if any, had been erroneously issued, and asks that the law may be repealed that fixed this limitation.

The Committee on the Public Lands of the House, in response to the request of the President, prepared the bill now before the House extending the time as to these Mexican, Spanish, and railroad land grants for a period of five years. We fixed upon that time for this reason: Last year the entire force of the division of the Interior Department engaged in this work succeeded in adjusting land grants to the extent of 12,000,000 acres. There are about 60,000,000 acres of land grants yet unadjusted. The committee believe that in five years, with the same diligence shown by the Department during the last year, they could adjust all of the remaining grants. If we gave them ten years to do the work in, instead of five, the committee believe it is likely that nothing will be immediately done; but if the time was limited to five years, active work will be done, and I think that the work will all be complete within that time.

The previous adjustments of these grants have only been carried through the Department at the rate of about 3,000,000 acres a year until during the last year, when by active, diligent work, the Department succeeded in adjusting 12,000,000 acres. This bill, therefore, in the judgment of the committee, gives ample time for the conclusion of the work.

As to the settlers now on the lands, we report that the individual settlers or purchasers who have bought land from the railroad companies and other parties, and who are innocent holders of land, should not be disturbed, and that the limitation of the act of 1891 shall be absolute after the 3d day of March next.

There are in California, in Kansas, in Nebraska, and in other States very considerable quantities of these lands which have passed into the hands of innocent holders, and they are protected by the bill in its present form. I now yield ten minutes to the gentleman from Arkansas [Mr. McRae].

MR. HARTMAN. Before the gentleman does that, I want to ask him a question. I am interested in this bill, as he is, and I favor the bill. There is only one thing about it that I want to ask his judgment upon. Commencing in line 12 of page 1, and ending on line 15, page 2, the following language occurs in the bill:

"But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Now, in many instances purchasers of these lands have bought them prior to the issuance of the patent by the Government to the railroad company. I want to know whether their rights will in any way be affected by the provisions of this bill? To illustrate my point, I will say that there are now in the neighborhood of 2,000 men in the State that I represent here who are bona fide purchasers of Northern Pacific Railroad lands. They have taken them in good faith, made a partial payment, bought them on the five and ten year contract plan. They have made partial payments on those lands, and have gone into possession and made improvements. Now, what I want to know

is, will their rights be entirely preserved by this bill? If not, I desire to have it amended so they will.

MR. LACEY. It seems to me there is no question about that, as to settlers who buy the land from railroad companies having lands granted to them by acts of Congress. After the settler buys a patent is issued to the railroad company. That patent at once inures to the benefit of the purchaser, and he having bought the land and subsequently held it in good faith would be protected by the provisions of this bill. That was the intention of the bill. I think it is fully broad enough to cover it. In addition to that, sections 3 and 4 have been added, giving opportunities for the settler to have his title confirmed in the Department of the Interior. But we have in the closing words of this first section provided expressly that the title of bona fide settlers is not only protected by the limitation, but it is affirmatively confirmed by the act itself.

MR. HARTMAN. You will observe, though, that the language says that "no patent" to any lands held by a bona fide purchaser, and so forth, shall be affected. That contemplates the previous issuance of a patent.

MR. LACEY. Not at all.

MR. HARTMAN. If there has been no issuance of a patent, but the railroad company have simply taken the land under the grant, and then have sold it to purchasers, and those purchasers have paid all or a portion of the purchase price, how are they protected?

MR. MCRAE. The gentleman from Montana must remember that this bill only deals with patented lands. As to the class of settlers he refers to, their rights will be determined under the forfeiture act of 1890 or any other act that may be applicable.

MR. LACEY. The act of 1887.

MR. MCRAE. This only deals with erroneously patented lands.

MR. LACEY. The class of settlers referred to by the gentleman from Montana is not affected one way or the other by this bill.

MR. HEPBURN. I desire to ask my colleague one question about this. There are, in the State which he and I represent in part, over 3,000,000 acres of land that might be affected by this statute. There is a provision here that the lands held by the bona fide purchaser shall not be harmfully affected, that is, so far as the annulment of the patent is concerned, but there may be a suit against every one of the holders of that land unless they do something to establish to the satisfaction of the Secretary of the Interior that they are bona fide owners. Will not this impose upon every one of these men the necessity of establishing that fact before the Secretary of the Interior?

MR. LACEY. No, it will not.

MR. HEPBURN. No man will be certain until the five years have elapsed that he may not be the defendant in a suit, for he can not tell what particular patents it is the purpose of the Secretary to attempt to invalidate, and his only safety in avoiding that litigation is by himself taking the initiative to satisfy the Commissioner that he holds by a bona fide title. To my mind, Mr. Speaker, it throws the cloud that may result from the fear of litigation upon every one of these acres of land and continues it for five years.

MR. LACEY. Not at all. The cloud is simply in the mind of my friend. We have carefully considered that question. That limitation will expire absolutely

on the 3d of March. It only runs about two weeks now, and the present bill does not extend it.

MR. HEPBURN. Their title would then be perfected?

MR. LACEY. The title would then be perfected. It has been amply cared for, and if they desire to avail themselves directly of section 2 they may do so, or other persons can do it for them; and it is only, as I have said, to run two weeks longer.

MR. HEPBURN. But if this law runs what would prevent the Secretary of the Interior from bringing his action for the annulment of patents of every one of these acres during any part of the limitation fixed?

MR. LACEY. The act of 1887 and 1891 require that there shall be ninety days within which the settlers or any person against whom an action can be brought shall be notified and demand for reconveyance made, and the limitation expires in two weeks, so that it is impossible for the Government to make the demand, as the ninety days expire within two weeks. The whole matter has been carefully guarded in this bill.

MR. HEPBURN. Does not this simply extend the provisions of an act amended relating to where another party has gone on the land afterwards?

MR. LACEY. It does as to the original patentees, while the land remains in their possession, but where the land has been sold to an outsider or a bona fide settler the rights of the bona fide settler are protected.

MR. HEPBURN. But how about that? Is this changed in order to prevent litigation? Is it to put a limit upon the power of the Secretary to prevent these suits, which must be done by the holder of the

present title by showing to the Secretary that he is a bona fide settler?

MR. BOWERS. His ninety-days' notification will expire before that time.

MR. LACEY. The limitation provided in the act of 1891 expires on the 3d day of next March, and these men are protected, therefore; and the second section was drawn after consultation with gentlemen from my friend's district, where the most of these lands [1765] in Iowa are situated, and this section was put in to protect them if anything should happen between now and the 3d of March; and I am able and glad to say that the rights of the men now living in the Eighth district of Iowa have been carefully guarded by the bill.

MR. HARTMAN. In view of the fact that there seems some question as to whether the rights of the bona fide purchasers in lands which have been patented from the railroad companies are to be protected fully here, would the gentleman have any objection to accepting an amendment to section 1 on this line, so that the last clause should read, "But the right and title of any purchaser of lands granted to any railroad company shall be, and they are hereby, confirmed to such purchasers subject to the full payment of the contract price therefor?" Would the gentleman have any objection to such an amendment as that, which eliminates all doubt?

MR. LACEY. That raises another question that was not considered by the committee. It was not involved in our examination, and not necessarily involved in this bill.

Now, Mr. Speaker, this bill only deals with patented lands. When a patent is issued for a quarter

section of land held by some person whom my friend has in his mind now, under the act of 1891, and an action may hereafter be brought at any time within six years from the time at which that patent may issue, and this bill changes the time to ten years instead of six, so that this bill does not affect them in any way injuriously as to the patents hereafter to issue, but only deals with patents heretofore issued.

MR. HARTMAN. Do you mean to say that within five years from the date it changes the time in which patents will issue in the future? How is that?

MR. LACEY. It was proposed both ways in the committee.

MR. HARTMAN. Do I understand the gentleman to say this: If any purchaser of land for which patent has not already issued to a railroad company has made a part of his payments upon those lands, and we will say the next year patent issues, that within ten years from the date of the issuance of that patent an action can be brought against that bona fide settler?

MR. LACEY. Certainly.

MR. HARTMAN. Then I submit that you are not doing anything to protect the rights of the bona fide settlers.

MR. LACEY. The gentleman does not understand the situation.

MR. HARTMAN. I have about 2,000 constituents who are interested in just such matter.

MR. LACEY. Let me explain, and I think you will agree with me. The bill contemplates that in a case where a railroad company should have sold lands outside of its grant, and by mistake that land should subsequently be patented to the railroad, an action

to cancel that patent will be limited to ten years; and the act of 1887 fully protects the men who are situated like those you speak of. They are entitled to a prior right in their land, and their rights are fully protected by the act of 1887. But this bill had no such purpose in view. It does not intend to confirm the title of the lands in the railroad company that may have been heretofore sold beyond the limits of its grant.

MR. HARTMAN. Admitting that to be true, surely the gentleman does not pretend to say that the rights of a party who has bought land in good faith of a railroad company and paid his money for it, and gone on and made his improvements and expended large sums of money in that way, are protected by a bill which simply gives him a preference right to locate upon the land and buy it again from the Government?

MR. LACEY. How could a man buy in good faith from a railroad company lands that were 40 miles, or even 3 or 4 miles, outside the limits of the grant?

MR. HARTMAN. Oh, that is an exceptional case. That does not apply to one case in a thousand.

MR. LACEY. Well, that is the only class of cases that will be affected by this bill. It is in the main a question of divisional lines, as to whether the grant covers the quarter section or falls short of it, and if a man bought lands before the grants were adjusted and patented, from somebody who did not own those lands, he can, under the act of 1887, procure the patents to be issued to himself, and thus be fully protected. On the other hand, in Montana a number of patents have been issued for lands that did not belong to the railroad company and which has sold them, and those purchasers are fully protected by this bill, notwithstanding the fact that the Government patented lands

to the railroad company that the company was not entitled to.

I now yield to the gentleman from Arkansas [Mr. McRae].

Mr. McRae rose.

MR. PICKLER. Before the gentleman from Arkansas enters into the discussion of this bill I want to ask him a question. I observe that his amendment contemplates an amendment of the timber-culture law. I want to ask him whether this bill or the substitute affects the timber-culture entrymen?

MR. MCRAE. It proposes to repeal section 8 of that law, not the whole law. If the gentleman will read the substitute he will see that it applies only to section 8.

MR. PICKLER. Well, does that in any way affect timber-culture entrymen?

MR. MCRAE. Not at all. I shall not attempt, Mr. Speaker, to discuss this bill in detail. I think that in some respects it is very imperfect, even along the lines that the majority of the committee have agreed upon, but if the committee amendments are adopted it will be improved. The point to which I ask consideration of the House is this, that the statute of limitation should be repealed outright. I do not believe that there should be a statute which would prevent the Government from bringing suit to correct mistakes and frauds committed by its agents or otherwise. In 1806 there was a statute of limitation passed prohibiting suits brought on the bonds of United States marshals, and that is the only statute of limitation passed during the history of this Government until the act of March 3, 1891,

which is involved in this bill, and it produced such a condition of affairs in the Department of the Interior as made it necessary to call the attention of Congress to it by a special message from the President. Now, sir, the very presence of this bill is the strongest argument that I could make for the position I assume.

It demonstrates the danger of all such legislation. It shows how easy it is to defeat justice and promote fraud when there is a statute of limitation that validates the latter. The experiment made by the Fifty-first Congress in passing the act of limitation ought to convince us that there should be none, because here we are with a large part of the railroad grants yet to be adjusted and the time fixed by that law practically out. We are urged by the Executive to act promptly, and yet on account of bonds and appropriations and other reasons it is a month before we get consideration in one branch of Congress. Millions of acres of land belonging of right to the homeless people will by reason of mistakes and frauds be lost unless we can get the concurrence of both branches and the Executive to repeal or extend the limitation against suits. The railroads want the bar to attach, and it will be hard to prevent it now.

I introduced and the last House passed a bill to repeal section 8 of the act of March 3, 1891, but no action was taken in the Senate. It may not act now. I believe that the Government, which must act through its agents, will necessarily at times have some who are incompetent, careless, or dishonest, and that it should not be bound by the doctrine of

estoppel or laches like individuals who have their free volition to act at once.

MR. TAWNEY. How much time has the Government had to adjust these patents?

MR. MCRAE. Since when does the gentleman mean?

MR. TAWNEY. Since the mistakes of the Interior Department were made. The gentleman was speaking about not holding the Government responsible.

MR. MCRAE. I do not know how many mistakes have been made. We can not tell until the adjustments are made.

MR. TAWNEY. But mistake is the basis on which the adjustments are asked for.

MR. MCRAE. The investigation and adjustment may show that a great many mistakes have been made.

MR. TAWNEY. Well, there ought to be some limitation.

MR. MCRAE. That is the very point where the gentleman and I do not agree. I am trying in my feeble way to show that there should be no limitation.

I insist that a sovereign government which is compelled to act through its agents ought to be at liberty at any time to expose frauds perpetrated or mistakes committed by those agents. When the certification and listing of railroad lands was first inaugurated the lists were made, not because they were regarded as patents, but simply as notice to all the world that the lands were claimed by the railroad companies. These lists were oftener than otherwise prepared by the railroad companies and signed by the Department officials without much examination, un-

der the supposition that it bound no one and that all errors could be corrected when patents were applied for.

In the course of time, however, the Land Department, which has grown and increased in importance with the years, eventually decided that these certificates made after this imperfect examination possessed the same binding force in law as patents. By the second section of this bill the certificates are treated as patents, and yet we are told that there should be a limitation against exposing and correcting the frauds that have been carried or may be carried into certificates obtained in this way. It is a dangerous policy, and will cost us much in the end. No harm can come to any honest settler who holds by purchase in good faith under the act of March 3, 1887, for by it he is secured in all of his rights. I do not object to any reasonable protection to settlers and honest purchasers, but I do not want corporations and syndicates to hide their frauds behind imaginary settlers.

My proposition is to give the President what he asks for, to give the Department what it ought to have and what it has always had until the act of 1891, and then hold them responsible for errors and frauds. If you will do this you will hold over the heads of [1766] all corrupt agents who might be induced to perpetrate a fraud the fear of exposure and punishment, but if you fix a limitation you offer a premium to corruption. Many of the sharp, shrewd representatives of railroads will be able to cover up for a limited period frauds of the greatest magnitude, and thus dishonestly take from the settlers millions of acres

of land which they ought to have and could get but for the validation of such frauds by laws like the one proposed.

I think the proper thing to do is to repeal the whole limitation clause; but if you can not see your way clearly to do that, the next best thing is to pass the first section of the bill the committee recommend.

MR. UNDERWOOD. Mr. Speaker—

MR. LACEY. I had an understanding with the chairman of the Committee on Agriculture, and also with the Chair, that this bill would have been called up earlier in the day, in time to be disposed of without delaying the Agricultural appropriation bill. I only ask now that the further consideration of this bill be postponed, retaining its present status, until the Agricultural appropriation bill is disposed of.

MR. LOUD. I have no objection to letting this bill go over until we dispose of the agricultural bill; but I have no disposition, in view of the fact that the Chair has already held it to be privileged, to agree that it shall retain its present status. I would not feel inclined to grant it any extraordinary privilege over and above what the bill now carries.

If it is amended to suit me, and as I have suggested to the gentleman from Iowa, by striking out these allusions to the Mexican-Spanish grants, that will be another matter.

MR. LACEY. Well, that is a matter on which we can confer personally hereafter. I have no objection to it myself.

THE SPEAKER pro tempore (MR. GROUT). The gentleman from Iowa asks unanimous consent that the further consideration of this bill be postponed

till the conclusion of the agricultural bill, and then to be taken up, following it immediately, retaining its present status. Is there objection?

MR. LOUD. To the latter part of the proposition, Mr. Chairman, I must object.

MR. LACEY. Then, objection is made, and we will have to go on with the bill.

MR. MCRAE. Would it be in order to postpone the further consideration of the bill until Monday or Tuesday or any other day the gentleman from Iowa may suggest? It will not lose its privilege, as I understand.

MR. LACEY. I will make the suggestion, in view of the arrangement with the chairman of the Agricultural Committee, that the bill go over. I move to postpone the further consideration of the bill until the Agricultural appropriation bill is disposed of.

MR. LOUD. If the request of the gentleman from Iowa had been put in that language I should not have objected to it.

MR. LACEY. I understand the gentleman from California objects.

MR. LOUD. No; I said that I should not object to the language of the suggestion now made by the gentleman from Iowa that this bill simply go over until after the Agricultural appropriation bill is disposed of. What I do object to is the attempt that the gentleman has made to make it privileged.

MR. LACEY. I ask also that it retain its privileged character.

MR. LOUD. But the Chair has already decided that the bill is entitled to a privilege which would not be interfered with, I suppose, by letting it go over.

The bill would be entitled to the same privilege at any other time that it is entitled to now.

THE SPEAKER pro tempore. Is there objection to the request of the gentleman from Iowa?

MR. UNDERWOOD. I did not understand the request. Will the Chair please state it?

THE SPEAKER pro tempore. Unanimous consent is asked for the postponement of the further consideration of the bill until the conclusion of the consideration of the Agricultural appropriation bill, and then to be immediately resumed.

MR. LOUD. Ah, Mr. Speaker, but that was not the request, as I understand it, which the gentleman made. The motion was to postpone the bill until after the Agricultural bill was disposed of.

THE SPEAKER pro tempore. The Chair is conscious that he added the latter clause. The request is that the further consideration of this bill be postponed until the conclusion of the Agricultural appropriation bill. Is there objection?

MR. UNDERWOOD. Do I understand the Chair to hold that the bill does not lose its privileged character?

THE SPEAKER pro tempore. The Chair understands that it loses no privilege which it now possesses. Is there objection to the request that the bill go over?

There was no objection.

[1904] HOUSE OF REPRESENTATIVES

Tuesday, February 18, 1896.

SUITS TO VACATE PATENTS UPON PUBLIC LANDS.

MR. LACEY. Mr. Speaker, I desire to call up the bill (H. R. 5474) to provide for the extension of the time within which suits may be brought to vacate and annul patents upon public lands, and for other purposes. This is the bill that the House was considering and which was temporarily laid aside in order to dispose of the Agricultural appropriation bill. It has been read in full, and is now pending upon the amendments submitted by the committee. Perhaps there ought to be some brief explanation of the measure. I will occupy only a moment in refreshing the memory of the House upon the subject.

This bill has been prepared by the Committee on Public Lands in response to the President's message which was laid before the House on the 17th of January last. A question arose the other day as to the insertion of the proposed amendment to include the Mexican and Spanish grants. I can only say for myself that I did not favor that amendment. A majority of the committee, however, supported it, and it was, therefore, reported to the House. These Spanish and Mexican grants are very ancient; they date back to the earliest recollection of old men now living; many of them had their origin in a past generation. The limitation provided in the act of 1891 will, if not interfered with, become absolute on the 3d day of next March. Speaking only for myself, I have no objection to the modification of that part of the bill, so as to include railroad and wagon-road grants only,

omitting the proposed provision in regard to Mexican and Spanish grants. Some member of the committee who favored this proposed amendment would perhaps like to be heard on the other side of the question.

MR. UNDERWOOD. Mr. Speaker, I rise to state the reasons why I do not favor this bill in the form in which it is before the House. I am one of the members of the committee who have joined in filing a minority report. I am in favor of extending the time allowed the Government for forfeiting these public-land grants, but I do not favor the report of the majority of the committee. While I prefer the bill as reported by the majority to no legislation at all, my views are represented by a substitute which the minority of the committee have offered, and which simply repeals the statute of limitations passed in reference to these lands and fixes no time of limitation. Let me state my reason for preferring no limitation to an extension of the present limitation of five years.

The Government of the United States can act only by and through its agents. Those agents are appointed at different times, usually changing office with each new Administration. They can not always keep themselves fully advised as to the public business, nor can they watch the interests of the United States as an individual can watch and protect his interests. Matters of grave importance with reference to these public lands may escape the attention of agents who have recently come into office. I know of no limitation that has ever been adopted by any State on any question except on the assumption that by reason of lapse of time the presumption had arisen that the title was perfected or the claim vested in the party exercising the right thereto.

Now, we know that today the Government of the United States claims that a large amount of these public-land grants should be forfeited, that the railroad companies to whom they were made have received, either through mistake or fraud, a large quantity of public lands to which they were not entitled. Now, I believe that the Government ought to give the railroad companies every acre of land that it agreed to give them. These land bounties were offered in order to secure the building of these great railroads, and the companies are entitled to the lands which the Government agreed to give them. But, Mr. Speaker, they are not entitled to land which was not covered by those land grants; and so long as the land remains in the hands of the railroad companies or the original patentees there can be no injustice done if the Government takes back that which properly belongs to it.

But it is contended that if these grants be forfeited it will work injustice to innocent purchasers from the railroad companies or from the patentees. If that were the case, I would say that as the Government has issued its certificates of patent, which have gone into the possession of persons who did not know that the railroad companies or the patentees had entered lands to which they were not entitled, we ought to protect such innocent purchasers. But I say that under the law as it stands to-day the courts of this land have thrown ample protection around those innocent purchasers.

Under the law as laid down by the Supreme Court of the United States, no man who has really purchased any of this land as an innocent purchaser can be affected or harmed by the repeal of this statute.

In support of that position, Mr. Speaker, I might refer to a number of cases. The act of 1887 itself protects innocent purchasers. I will not occupy the time of the House in reading many cases (for there are many which support my position); I will refer to only one decision, that of the Supreme Court of the United States in the case of the United States vs. The California and Oregon Land Company, decided only about two years ago. In that decision (which was delivered by Justice Brewer) the court expressly decides that innocent purchasers under these land grants are protected. [1905]

I send the decision to the desk and ask the Clerk to read the portion I have marked.

The Clerk read as follows:

"The right, therefore, of this defendant, the California and Oregon Land Company, to avail itself of a plea can not be doubted, and the plea which it made in the case, that of a bona fide purchaser, is one favored in the law. In the act directing these suits was a clause 'saving and preserving the rights of all bona fide purchasers of either of said grants, or of any portion of said grants for a valuable consideration, if any such may be.' In Story's Equity Jurisprudence, section 411, the author says; 'Indeed, purchasers of this sort (bona fide purchasers) are so much favored in equity that it may be stated to be a doctrine now generally established, that a bona fide purchaser for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage or other incumbrance upon the same estate for his protection. If he can defend himself by any of them at law his adversary

will have no help in equity to set these incumbrances aside, for equity will not disarm such a purchaser, but will act upon the wise policy of the common law, to protect and quiet lawful possessions and strengthen such titles.' And the reason of this is given in Boone vs. Chiles (10 Pet., 177, 210), as follows: 'This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect of it or adverse claim to it.' (See also, Lee vs. Polk Copper County Company, 21 How., 493, 497, 498; Croxall vs. Shererd, 5 Wall., 268.)

"In United States vs. Burlington, etc., Railroad Company (98 U. S., 334, 342) it was said: 'It (the United States) certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees.' And again, in Colorado Coal Company vs. United States (123 U. S., 307, 313): 'It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preemption claims and in the certificates issued thereon. This undoubtedly constituted an equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the

legal title of the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect.'

"The land company therefore has a right to set up a special plea, and the plea which it did set up, that of a bona fide purchaser, was sufficient, if true."

MR. UNDERWOOD. Mr. Speaker, the decision of the highest court in the land has sustained the proposition that these innocent purchasers are protected, though it may be contended that they ought to go into court and establish that they are bona fide purchasers, while under this bill, or any act that you may pass, if the Government of the United States sees proper to raise the contention that they are not bona fide purchasers they will have to go into court to maintain the proposition that they are innocent purchasers.

You can not say that the Government shall not litigate, if you are going to pass any bill that will authorize the forfeiture of these land grants; and I contend if you pass the bill as it stands instead of the amendment, that in attempting to try to give these innocent purchasers what the law already gives them you will cut off the rights of other innocent persons to these transactions.

There are certain cases where the patentee—the homestead settler—went on the land first; entered and took up his homestead and the railroad company also filed its line of definite location and asked a certificate for particular classes of land so covered. Although the settler was first in possession of the land, although he is an innocent purchaser, under the law

the railroad company, having filed its claim with the General Land Office first, has the first standing with the Government; and yet, in some of these very cases, and in many of them, there are instances where the railroad has improperly entered land and is claiming land that does not properly come under the grant. That line of cases has been covered in the decision in the United States vs. The Winona and St. Paul Railway Company and Thomas Marshall, jr., reported in 69 Federal Reports, page 948.

If you pass this act you absolutely cut off any right of the Government to protect the men who went on as bona fide holders and entered their homesteads on the land. But if you repeal the act entirely, as we ask in the substitute, you leave the question open, so that, as to the lands the roads have improperly taken, the Government can forfeit them, and it leaves the homestead settler in possession of his home.

Another view I take in reference to these purchasers—the innocent purchasers (and the Government, I say candidly, ought to protect all of them)—under the existing law, under the statute of 1887, and the decisions arising under that act, similar to the decision I referred to and had read from the desk, all of these people are protected. The courts have gone through that law and have construed it; the settlers know what it is; there is no doubt and nothing left for construction; but if you put a new law on the statute book you establish something that before it is settled must be construed, and you all know that before this statute can be construed some time must elapse, and you only increase the amount of litigation that the settler will be subjected to instead of lessening it.

For that reason I advocate the substitute that is offered by the minority instead of the bill that is offered by the majority; but I say we ought to have some legislation, and if the House is unwilling to accept the substitute, then I shall vote for the bill offered by the majority.

MR. HEPBURN. I move to amend section 1 of the bill by adding:

"*Provided,* That all lands patented or certified to any state, corporation, or individual, under the rulings or constructions of law of the Commissioner of the General Land Office, or the Secretary of the Interior, at the time of the issuance of said patents or certificates, and when no fraud has been committed by the agent of the State or corporation or by the individual, shall be excepted from the operation of the provisions of this act as to extension of time and bringing of suits, and of the act approved March 3, 1887, entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.'"

Mr. Speaker, in the district in which I live there are at least 200,000 acres of land granted to the State of Iowa, to aid in the construction of railroads, nearly forty years ago. This land grant was adjusted and the certification made in 1859. Thirty-seven years have elapsed since the corporation taking under this grant from the State became the owner of these lands. Every acre of this land was sold many years ago, and is now in the hands of settlers—of farmers. In my judgment this bill, notwithstanding the opinions that have been presented here by some gentlemen, does disturb this class and throws a cloud upon every one of these titles.

It is true that there is a clause in this bill whereby at the end of litigation or by filing evidence of the title of the new holder he may not be seriously disturbed. But no one of all those settlers knows what particular tract of land will be selected by the Secretary of the Interior under the act of 1857 as the subject of litigation. Every man's land is clouded with the thought, with the certainty, that the Secretary of the Interior may institute a suit against him. He may be conscious of his ability to defend himself, but he does not want to go to a Federal court, possibly 100 or more miles away, into a community in which he is a stranger, and there make his defense. He can not do it without incurring expense.

Now, Mr. Speaker, this is a matter of importance. Only a week ago one of my clients wrote to me that, under the act of 1887, although he had his certificate, his duplicate—which under the laws of the State of Iowa is all the evidence of title that he needs—although he has held that for more than forty years, he has recently been notified by the Department that under the readjustment of that Department, going over the old entries, they have discovered that his land was within the limits of a railroad, and was double-minimum rather than single-minimum land. On those lands he had located a Mexican land warrant, paying the difference for the fractional quarter. He was notified of the annulment of his patent, and required to pay the additional sum that would make the aggregate of the double-minimum price, after forty years. I say that is not right, and that there ought to be a statute of limitations that would be a bar against the Government as against individuals.

There is no reason why the officers may be negligent for forty years and then at the end of that time come upon a purchaser, as in this case, not the original purchaser, and require the new owner to make this payment. The other man is dead and gone long ago and his estate has been settled, so there is no possible redress for the present holder. It is not right or proper.

The gentleman from Arkansas [MR. MCRAE], in a speech that he made to this House the other day, told the House that the statute of 1887—to be continued in its operation by this act—was a statute for the recovery of lands fraudulently obtained from the Government. I have taken occasion to make inquiry, and I find that in all of the adjustments in every case where the company has been required, under the provisions of the act of 1887, to make reconveyance, in not a single instance has there been an allegation of fraud.

These cases do not arise even from any mistake of fact. There is neither mistake of fact nor fraud involved in this. They grow out of the changes of construction by the officers today differing from those of the officers of twenty, thirty, or forty years ago. For instance, years ago the Department held that in case of a fraudulent preemption, or where a preemption had been abandoned, the preemption entry did not serve to extract the land from the operation of the donating statutes. Under that, in cases of that kind, where the preemption filing had been made, but abandoned, or shown in contest to be fraudulent, the lands were certified to the State, and from the State of Iowa to the railway company. The Department has recently changed that ruling, perhaps under a late

decision of the Supreme Court, which holds that that kind of an entry did serve the office of extracting those particular lands from the operation of the granting statute.

Although these lands were long ago certified to the company, although they have sold them, now they require the company to [1906] reconvey the lands conveyed to them long ago, which requires the holder of those lands to show that he is at present a bona fide holder in order to prevent the institution of suits against him, and in failure of that, requires him to go to a distant court to make defense to show that he is a bona fide holder. I do not believe that there is any justice in that.

The gentleman from Arkansas [MR. MCRAE] the other day said in his speech to the House that these certificates were a mere matter of form (substantially he said that), prepared often by the railroad companies; that their office was simply to serve as notice that those particular lands were claimed by the railway company as lying within the grant. The gentleman was certainly mistaken. This form of patent, this method of certification, was authorized by the statute of 1854. They take the place of patents in land grants. The Federal courts have held that they serve every purpose of patents, and of all the grants that have been made to the State of Iowa or to the railroad companies within that State not one acre is to-day held under any other muniment of title than such a certificate as the gentlemen told us the other day was a mere formal something intended to serve the purpose of notice.

They were authorized by the statute of 1854. At the time of some of the earlier grants his own State

was one of the grantees under the act of 1849 of the swamp lands lying within her borders, and the State of Illinois was a grantee under that act to aid in the construction of the Illinois Central Railway. It makes them muniments of title. It was found to be an impossibility almost for the old form to be observed and for patents in each individual case to be issued. It was an almost interminable work, and then the act of 1854 was passed, and it has all the effects, so far as taking its title from the Government is concerned, of the most formal patent that ever was issued in the world.

Now, Mr. Speaker, these lands are patented and have been occupied for thirty or forty years. There is no reason or justice why repose should not be given by statute to all of these titles. If we simply allow time to pass, repose will be given to every one of them on the 3d day of next March, and no one of these settlers can be disturbed. In some of the proposed suits, I learned from the district attorney of the district in which I live, it will be necessary in carrying out the provisions of the act of 1887 to make 2,000 people defendants to these suits. Two thousand people! In these particular cases, when it is all done, what boots it to the Government? It is a conflict between the beneficiaries of two grants.

The Government granted land to the State for swamp-land purposes, and the Government granted land to the State for railroad purposes. There was a conflict between the company and certain counties, who were in their turn grantees, as to who was the owner. These disputes were all composed twenty or twenty-five years ago by compromises and conces-

sions, the one or the other party quit-claiming as to the other. The Government has no title of any kind. It is a conflict that they are proposing to carry on with reference to grants, and when this is all settled, at an expense of infinite litigation, not an acre goes to the Government. Why, then, should we not give repose in this class of cases?

In another instance that I am familiar with, Mr. Speaker, in your own State [MR. MERCER in the chair], there was a grant to a company when practically, by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The Department held that lieu lands might be given—lands in another locality—and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of this road and take 201,000 acres, and one block of 10,000 acres of it they sold for $2,500—25 cents an acre; but they took these lands under the then ruling of the Department.

Under the advice of the law officers of the Department, subsequently the Department changed its view. When this was done men of eminence held the position. The lists were not made by railroad attorneys. Some of the lists of which I am speaking bore the signature of Thomas A. Hendricks, the then Commissioner of the General Land Office. He was not a man who transacted his business in the loose way characterized

by the gentleman from Arkansas. He was certainly mistaken in the statement that he made that that ruling was adhered to until quite recently. Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries and selections were void. Now, one of the suits ordered is to recover the title of these lands taken in lieu of those that the company lost through the failure of the Federal officers to withdraw the lands from market.

I am not prepared to say that successful tests might not have been made, but they elected to take the other course and leave the settlers in quiet occupation. Now, sir, these lands in turn are settled. They are not in the hands of corporations, and if my amendment is adopted, every recovery can be had except in cases where the mistake has occurred—if it is a mistake, for I want to say to gentlemen that any lawyer will agree that these are close questions about which men may well differ, though the party in power has said otherwise.

Every acre, I say, will be recovered where a mistake of law, not of fact, a misconstruction of law, an improper ruling, has been made by the officers of the Government, and, in addition to that, where no fraud appears. If there is fraud, notwithstanding the fact that the error was that of the representatives of the Government, recovery may be had. Now, if there is no question of fact; if there is no fraud; if there is no right save that which is grounded in a charge of ruling or construction, I submit that there is no such equity, no such justice, no such condition of affairs as to justify either the remarks made by the gentleman from Arkansas [MR. MCRAE] the other day or the demands

that are made by the provisions of this bill. I hope that the amendment which I have offered may prevail.

MR. LACEY. Mr. Speaker, this bill, in every line of it, from the beginning to the end, was drawn with special reference to the protection of the rights of bona fide purchasers. As to the instance that my colleague cites as having occurred in Nebraska, I propose at the proper time to offer an amendment which I think will cover the points he has in mind. I will send the amendment to the Clerk's desk to be read as a part of my remarks, so that it may appear in the RECORD for the information of members.

The amendment was read, as follows:

"Add at the end of section 1: *'Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.'"

MR. HEPBURN. Mr. Speaker, I hope my colleague will not offer that until a vote has been had on my amendment.

MR. LACEY. I do not propose to offer it at this time. Let me now briefly call the attention of the House to a difficulty in relation to one of the points embraced in the amendment of my colleague, which is this: His amendment provides that where patents have been erroneously issued without fraud they shall be confirmed. Now, these patents were erroneously issued frequently by the mistake in law or fact of a twelve-hundred-dollar clerk, and subse-

quently the Supreme Court of the United States decided that they were issued through mistake in the construction of the law. Evidently, if any of the lands thus patented to the company, which is does not own and ought not to have, are still held by the company, they ought to be reconveyed.

This bill protects the title where the lands have been sold, but if any of those lands are still in the hands of the company there is no reason why the patentee should not give them back if they have been erroneously patented, even though there was no fraud whatever. The amendment I have suggested will protect the interest of the settlers on these lands and at the same time it will leave the Government the privilege of acquiring again the titles to unsold lands that were erroneously patented.

MR. MCRAE. Mr. Speaker, I do not understand that the general debate is closed, or that the amendment of the gentleman from Iowa could be considered at this time. I understand it has only been read for information.

MR. LACEY. It has only been read for information.

[1934] HOUSE OF REPRESENTATIVES

WEDNESDAY, *February 19, 1896.*

SUITS TO VACATE PATENTS UPON PUBLIC LANDS.

MR. LACEY. I call for the regular order.

The House, as the regular order, resumed the consideration of the bill (H. R. 5474) to provide the extension of time within which suits may be brought

to vacate and annul patents upon public lands, and for other purposes.

MR. LACEY. I ask my colleague [MR. HEPBURN] to withdraw his amendment now pending until we can dispose of the amendments reported by the committee.

MR. HEPBURN. For the purpose suggested, I withdraw my amendment for the present.

MR. LACEY. Now I desire to call for a vote on the committee amendment to insert before the words "special grant" the words "railroad, Mexican, Spanish, or other." So far as I am concerned, I think this amendment ought to be voted down, though I do not feel at liberty to withdraw it. The amendments which other gentlemen desire to offer can come up later.

MR. LOUD. I wish to submit as a substitute for the amendment of the committee an amendment which I think will cover the whole proposition.

MR. LACEY. Let it be read.

MR. LOUD. I will read it myself.

"In line 5 strike out the words 'special grant' and insert in lieu thereof 'railroad or wagon-road grants.'" [1935]

MR. LACEY. I am not at liberty to accept that on behalf of the committee, but I think it ought to pass; and I call for a vote.

The amendment of the committee and also the proposed substitute of Mr. Loud were read.

MR. DOLLIVER. We would like to have a statement of the effect of this amendment.

MR. LACEY. The effect will be simply this: The language of the original bill is "special grant." The

substitute of the gentleman from California proposes to strike out those words and to insert the words "railroad or wagon-road grant," covering the two classes of grants in the adjustment of which the Department is now engaged.

There is no question of adjustment as to the grants to individuals; but the amendment proposed by the committee is broad enough to open up the entire question as to Mexican grants, the Spanish grants, and other special land grants mentioned in the bill. Now, if the substitute of the gentleman from California [MR. LOUD] shall be adopted, it would eliminate everything from the bill in relation to the Spanish, Mexican, and other special grants, and would leave them untouched, and confine the scope of the bill to the railroad and wagon-road grants.

MR. MCRAE. Mr. Speaker, I am very much surprised that the chairman of the Committee on the Public Lands, who reported this bill with the committee amendment as printed, now recommends its abandonment. With that amendment out and nothing substituted, there is nothing whatever in the bill that would be of much value to the Department or the settlers.

MR. LACEY. I do not think my colleague heard the proposition correctly. Something is substituted for the amendment of the committee. But all the Spanish and Mexican grants are eliminated from the bill, and we insert in lieu thereof the railroad and wagon-road grants. So that the whole matter is substituted except as to the Spanish and Mexican grants, upon which, as the gentleman remembers,

we were not fully agreed in committee, and yet it was a question, in view of the fact that there was no special opposition to it, that we did not care to call to the attention of the House excepting in the shape that has been presented in the bill.

MR. MCRAE. Mr. Speaker, the hearings before the Committee on Public Lands showed that some of the most outrageous frauds that were alleged to have been perpetrated were in connection with these very grants to which the gentleman has referred. I have in mind a single Mexican grant made, if made at all, when the Mexican law did not permit the granting of more than 11 leagues of land to any one individual, and yet it has been so surveyed and manipulated by the officers of the Government that it now includes 14 leagues of land; and we are informed that there are people in that vicinity who desire to enter these public lands as homesteads and they want the Government to at least purge the grant of fraud. If the amendment of the gentleman from Iowa [MR. HEPBURN] is adopted, then all patents and certifications are confirmed, and we will be deprived of all right to investigate as to the validity of the original grant, the survey of it, or any fraud or mistake connected with its confirmation. I think that all of these grants, railroad, wagon-road, Mexican, Spanish, and special, should be put upon an equal footing and adjusted upon the same basis. There should be no special exceptions in favor of any of them.

The gentleman who spoke on yesterday questioned some statements of mine which were made in the discussion of the bill on a previous occasion. The information I gave to the House was, in substance,

such information as came to the committee in the hearings on the bill; information that came from the Department which is supposed to know something of the early practice in making lists for railroads; information which I believe to be true, notwithstanding the denial of the gentleman. But, Mr. Speaker, if I am in error in stating that many of these lists were made under the impression that they should not be treated as patents, and if the gentleman is correct in stating that they were always treated as patents, then all the certificates behind which the gentleman undertakes now to shelter the railroads are the more outrageous, because he admits that there are many mistakes. I made no charge of actual fraud against the Department. I prefer to believe and would exonerate, as far as possible, the gentleman who made up the list. I know that the Commissioner, whoever he was, could not personally examine the tract books to find mistakes, and that he signed the lists prepared for him. I adopted what appeared to me to be a reasonable excuse for these errors. Now, if that is not true and these men knew that these lists were to have the force of patents, then the thousands of errors which are in many cases admitted, and in all cases in favor of the grantees, drive us to the conclusion that they were procured by corrupt methods either on the part of the railroad companies or the Government.

Now, Mr. Speaker, there is a class of settlers, and they have been entirely overlooked in the consideration of this bill, that is, those who claim under the public-land laws, whose rights should be protected in some way. This bill does protect, and it seems

that its main object and purpose is to protect, purchasers from railroad companies. But little has been said and nothing done for the settlers who claim under the public-land laws of the United States. The interests of these two classes of settlers often conflict. For instance, A buys from the railroad company, which has an erroneous certificate or patent, as the case may be; B applies to enter the land under the homestead law, and alleges that the land did not pass to the railroad company and is of right a part of the public domain.

Now, this bill will confirm the land to the purchaser from the company and defeat the settler who has undertaken to claim under the public-land laws. There are many such settlers, but they have few friends here. That is the class I wish to protect first of all. They have stood in the breach and contested every inch of ground with the corporations from the time the grants were made, and yet they are now to be denied the right to take the land because the road has sold it to some speculator. I deny that this is right or just to claimants under our public laws. The proposition would confirm and fully protect the railroads. But no effort has been made to aid or protect that class of homeless citizens whom it is our duty to protect, and who have spent their time and money to vindicate the law. I hope this bill will not pass until some provision is made to protect bona fide settlers as was done by the act of 1887, and when their rights conflict with the rights of purchasers from railroads to give them a preference.

In your efforts to give quiet and repose to speculative purchasers do not destroy the legal and the

equitable rights of those honest settlers who have been contesting and expecting to finally acquire homes on these lands.

Mr. Speaker, I have already said I do not believe there should be any statute of limitations against the Government which will prevent the unearthing and exposure of frauds. I am not afraid that the settlers of the country who have patents will be troubled by lawsuits. In the history of the Government, prior to 1891, I believe only 25 suits have been recommended by the Land Department against agricultural patents. There is no danger of any honest settlers being troubled with lawsuits on the part of the Government. What the Department wants, and what it ought to have, is the right to correct any errors in these lists if they contain mistakes and to purge them of all frauds; and let us not, because some of these lists were signed by that great and good man, Thomas A. Hendricks, say that we will not examine any of them. I was a little bit amused at my friend from Iowa [Mr. HEPBURN] yesterday, when he talked so eloquently about the lamented Thomas A. Hendricks. During the lifetime of that illustrious man I do not suppose that my friend from Iowa was ever heard to say a kind word concerning him, but when he is dead, and the gentleman from Iowa is speaking for a class of persons who hold as purchasers under great railroad corporations, he would shelter them behind that grand and glorious name. I revere the memory of Hendricks. The first Presidential vote that I ever cast in my life was a ticket upon which his name appeared as a candidate for Vice-President of the United States.

No purer and no better man ever lived within the borders of the United States. I wanted to see him President.

MR. HEPBURN. Will the gentleman permit an interruption?

MR. MCRAE. Certainly.

MR. HEPBURN. You seem to quarrel with me because I speak well of Mr. Hendricks after his death.

MR. MCRAE. No; I do not quarrel with you for speaking well of him even now.

MR. HEPBURN. It is the post-mortem virtues of Democracy that I usually applaud. [Laughter.]

MR. MCRAE. It is the improper use that you make of his good name and the outrageous purposes for which you would use it—perhaps unintentionally—to which I object. I challenge your right to use the good name of Thomas A. Hendricks, because he was once Commissioner of the General Land Office, to cover the mistakes or the frauds or the misconstructions, if you please, of these railroad certifications by which corporations and syndicates have secured millions of acres of land that they are not entitled to.

I deny that the statute of limitations which was passed in 1891 has been of any benefit to anyone. It passed without consideration. No one, so far as the record shows, knew of any such purpose. It was put in by a conference committee, and nobody except the conferees had any idea that there was any such provision in the bill. It did not belong there, and I think we should lose no time in repealing it to enable the Department and the courts to purge these railroad grants of fraud. When the 3d of March comes,

if Congress does not act by repealing the whole statute of limitations or extending the time, you will find all these errors and frauds confirmed, and it will be done in the name of settlers. For ten years, upon this floor, I have tried in my humble way to reclaim some of the lands granted to railroad companies, and every time we have made an effort we have been met by just such eloquent vehemence as the gentleman from Iowa [MR. HEPBURN] can furnish, insisting that it will disturb the titles of some innocent purchasers. In every step that has been taken we have tried [1936] to protect purchasers and settlers, and yet with every step the railroads, in the name of their purchasers, have grown bolder and more determined until finally they procured a statute of limitations, and with only one-fourth of the grants examined a proposition is made to stop the investigations, and the cry comes for repose to them and their purchasers.

MR. LACEY was recognized, and yielded five minutes to Mr. Loud.

MR. LOUD. Mr. Speaker, the gentleman from Arkansas [Mr. McRae] has expended a great deal of force, aimed presumably at Spanish and Mexican grants, but still his shaft has ultimately landed in the railroad camp. His remarks were directed presumably at the substitute amendment offered by myself, which simply eliminates from this bill the Spanish and Mexican grants and leaves intact the railroad and wagon grants. Now, let me say to the gentleman and to this House that there is not a Spanish or Mexican grant in this country which is not musty with the age of more than fifty years.

There are no claims for Government lands pending upon any of these Spanish grants. We have been troubled in my State for a great many years, and we think the time has arrived, after more than half a century, when the bona fide settlers who have settled upon or who have purchased from these men who received Mexican grants should be protected in the title which they today have. For argument's sake I would admit that every acre of the Mexican grants was stolen, but they have been recognized for fifty years, and I hope the good sense of this House will now confirm the titles in these lands.

MR. LACEY. I yield five minutes to my colleague [Mr. Hepburn].

MR. HEPBURN. Mr. Speaker, two days ago the gentleman from Arkansas [Mr. McRae] made a statement to the House that the certifications under which these lands were held were in the early days not regarded by the authorities as anything more than mere notice to the world that the railway companies claimed these lands. The gentleman made that statement in face of the fact that before the first one now in controversy was issued that a statute of the United States required the officers of the Government to issue these certificates and the law gave to them all of the effects of patents. They are patents; and the gentleman ought to know it. For years he was chairman of the Committee on Public Lands and he must be familiar with the land system and the legislation; yet he made that statement here in the presence of this House.

I say that these lands are held under muniments of title as solemn as any that can be given by the

Government of the United States, and the statement of the gentleman, lacking every feature of verity, was possibly made for the purpose of throwing some cloud or slur upon this class of cases. The gentleman says that he wants to unearth fraud. No man is proposing to throw a barrier in the way of such an inquiry. If he had read the amendment against which he declaims he would have seen that in that there was a provision whereby the Government can inquire into every case where a title had been secured through fraud or mistake. No one wants to throw an impediment in the way of such an inquiry. The gentleman was misleading when he said that the purpose of this bill was to secure inquiry in such matters. I make the statement to him now, and I challenge him to contradict it, that in all the investigations that have been made that have resulted in demands for reconveyance under the act of 1887 not one single instance can he find where fraud is alleged. In every instance the Department has simply urged that there was at a time an improper construction given to the statutes; that they now give another construction; and they want these suits to be brought to enforce a new construction that they now, after more than twenty years, give to the statute.

Wherever there has been a demand for reconveyance that demand is for the reconveyance of lands that were patented under the rulings of the Department as they then existed and as they were continued, not alone under the administration of Mr. Hendricks, but under the administration of gentlemen who have for many years, more than twenty years, administered the office of the Commissioner of the General Land

Office and of the Interior Department. There was no variation in them for more than twenty years, and I want to state again to the House that the controversies are not with reference to fraud, that the controversies are not with reference to mistakes, but they are controversies growing out of changed rulings and new constructions that have been given by the Department in cases of this kind. That is the only subject of inquiry that the Department proposes to make, and they have not yet brought a suit or attempted to bring a suit which made claim for reconveyance except in cases where this was the only difficulty. Now, lately they have changed this ruling and changed their construction, and they want to bring suit because of new light that they claim to have had, and thus cloud and disturb titles held by settlers for almost a generation.

MR. LACEY. I now yield five minutes to my colleague on the committee [Mr. Bowers].

MR. BOWERS. Mr. Speaker, this bill was under consideration by the Committee on Public Lands for over three weeks, occupying the time of every meeting of that committee. It came in there through a message of the President of the United States calling attention of Congress to the fact that the time would expire on the 3d of March when the United States, by its own action, was debarred from commencing action against patentees where patents had been obtained through mistake, error, or through fraud. During the whole of that time the members of the committee were occupied in satisfying themselves that the title of every bona fide purchaser should be protected. There are three sections in the bill, and in each section that is provided for. Before the committee appeared the

law officer of the Department, Mr. Hall, and his proposition was simply that the time be extended to commence suits against railroad patents. That is all. At the last meeting, when this bill was reported, the words "to include Spanish and Mexican grants of lands," at the last moment, was included. I will come to that in a minute. I want to say to the members of the House, if they will give me their attention a moment, that if they will look at the bill they will find that the bona fide purchaser, whoever he may be, is protected, no matter if the railroad grant was made in error, or if it was made under fraud, still the bona fide purchaser under that notice is protected; and the bill provides always that the recourse of the United States shall be against the patentee and not the purchaser.

Section 1 provides that—

"No patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title in such purchaser is hereby confirmed."

In section 3 it is provided that—

"No suit or action shall be brought to cancel or annul any patent or certification for said lands until such claim is investigated by the Department."

We have provided all through the bill for protecting the rights of bona fide purchasers. Now, a word as to this amendment. As has been truly said, most of these Spanish grants are from forty to fifty years old, and there has been fraud in the granting of some of those patents; there is no question about that. But in the course of thirty, forty, or fifty years those lands have been settled, and whether the grants were fraudulent or not, this bill provides that every bona fide purchaser of those lands shall be confirmed

in his possessions, and it is a very grave question, Mr. Speaker, whether we should reopen those cases. The Department has manifested no disposition to open up that field of inquiry. In fact, I may say that the representatives of the Interior Department have stated that in their opinion this bill protects every bona fide purchaser, and that the Department has no disposition to open up these cases except to investigate the various land grants made to railroads and wagon roads.

The reason they ask for this extension is that the amount of money they have had for making surveys and determining these matters has been insufficient, while the general business of the Department has not afforded them time to investigate these cases. For that reason they want a little more time to make the proper surveys and to prepare themselves fully in regard to these railroad and wagon-road grants. I can assure every member of the House that every lawyer on the committee (and I believe they are all lawyers but myself), together with the lawyers of the Interior Department, have agreed that this bill does provide for protecting every bona fide purchaser of lands, whether the original patent was issued in fraud or error or not.

MR. LACEY. Mr. Speaker, I move the previous question on the committee amendment and the substitute offered by the gentleman from California [Mr. Loud].

The previous question was ordered.

MR. MCRAE. Mr. Speaker, I ask unanimous consent to have the amendment reported.

THE SPEAKER. The Clerk will report the committee amendment and also the substitute proposed by the gentleman from California.

The Clerk read first the committee amendment, as follows:

"Page 1, lines 4 and 5, after the word 'a,' insert 'railroad, Mexican, Spanish, or other.'"

The proposed substitute was then read, as follows:

"Strike out in line 5, page 1, the words 'special grant' and insert in lieu thereof the words 'railroad or wagon-road grant.'"

The question being taken, the substitute was agreed to by a vote of—ayes 73, noes 36.

The amendment as amended was then agreed to.

THE SPEAKER. The question now is on the second amendment of the committee.

The amendment was adopted.

THE SPEAKER. The question is upon the substitute proposed by the gentleman from Arkansas.

MR. LACEY. Mr. Speaker, there are some other amendments that members desire to offer to the bill.

MR. HEPBURN. Mr. Speaker, I desire to offer an amendment which I send to the desk [1937].

The amendment was read, as follows:

"Add to the first section the following language:

"'*Provided*, That all lands patented or certified to any State, corporation, or individual, under the rulings or constructions of the law of the Commissioner of the General Land Office or the Secretary of the Interior, at the time of the issuance of said patents or certificates, and when no fraud has been committed by the agent of the State or corporation or by the individual, shall be excepted from the operation of the provisions of this act as to extension of

time and bringing of suits, and of the act approved March 3, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes."' "

MR. LACEY. Mr. Speaker, I move as a substitute for that proposed amendment the amendment which was read in my time yesterday.

The amendment of Mr. Lacey was read, as follows:

"Add at the end of section 1: '*Provided*, That no suit shall be brought or maintained, nor shall recovery be had, for lands or the value thereof that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.' "

MR. LACEY. Now, Mr. Speaker, a word of explanation. My colleague [Mr. Hepburn] on yesterday explained that in Nebraska and in some other localities "lieu lands" had been patented in place of lands that the railroad companies had lost by reason of mistake in the Department in allowing settlement upon those lands. The amendment that I offer confirms the title to those lands that have been thus patented to railroad companies where they have lost other lands by reason of mistake committed in the Department. That will cover the point upon which my colleague based his argument yesterday.

MR. TAWNEY. May I ask the gentleman a question?

MR. LACEY. Yes, sir.

MR. TAWNEY. Your proposed substitute and the amendment of the gentleman from Iowa [MR. HEPBURN] relate solely to "lieu lands."

MR. LACEY. Certainly.

MR. TAWNEY. Now, the act of 1887 applies to lands that are known as "in place" lands as well as to "lieu lands."

MR. LACEY. Certainly.

MR. TAWNEY. Then why should we except lieu lands and still let the "place" and "indemnity" lands sold to bona fide purchasers remain under the provisions of the act of 1887?

MR. LACEY. We do nothing of the kind. The bill in express terms already protects the bona fide purchasers of all kinds of lands, "lieu lands," "place lands," or any other kind of lands.

MR. TAWNEY. It protects them at the end of a lawsuit.

MR. LACEY. Not at all.

MR. TAWNEY. It does not protect the bona fide purchaser so as to prevent a suit being brought by the Government against him and thus disturbing his title and the title to a great deal of land in the States where these suits are brought.

MR. LACEY. That may be. But so it is always with any person. A suit may be brought to attack the title of anybody. But when we frame a bill which perfects the title of these men, which says their title shall be confirmed, and is confirmed, and that if suit be brought it shall be the duty of the court to at once confirm the title, nothing more, certainly, can be done.

But let me call the attention of the House and of my friend who wants light on this subject to the pro-

posed amendment of my colleague, providing that when a patent has been issued, unless it has been issued by reason of fraud, that the title never can be assailed, although the railway company still remains in possession. It is true that by reason of some mistake tracts of land here and there have been certified or patented to railway companies that ought never to have received them, and the bill as we have prepared it will enable the Government to reclaim or recover those lands within the next five years. But if the amendment proposed by my colleague [Mr. Hepburn] be adopted, that is the end of it. Unless you can show that the railway company was guilty of actual fraud, then, although the company may hold hundreds of thousands of acres that ought never to have been patented to it—lands which were patented to it by mistake—those lands can never be recovered. There is no reason why the railway companies should be thus protected and permitted to hold lands which do not properly belong to them. There is reason why the settler should be protected. Whether the land which he purchased from the railroad company actually belonged to it or not, the company had the muniments of title, it had the patent, was clothed with apparent authority to make the conveyance, and the settler has purchased the land, entered upon it, taken possession of it, and improved it. In such cases, no matter how defective the railroad company's title may have been, the settler should be protected.

But while the lands are still in the hands of the company I see no reason why we should be careful to protect their title, if the land was conveyed to them by mistake.

MR. TAWNEY. The gentleman will concede, will he not, that when a railroad company has sold to bona fide purchasers, those purchasers ought to be protected by the Government?

MR. LACEY. Certainly. Not only do I concede that, but we have expressly provided in the bill that they shall be protected.

MR. TAWNEY. Now, when we know, as we do, that the greater part of the lands granted to the railroad companies have passed into the possession of bona fide purchasers, ought we not to take notice of that fact and protect them?

MR. LACEY. Certainly.

MR. TAWNEY. But ought we not to protect them against suits being brought by the Government to disturb their title?

MR. LACEY. I advise my friend to read the bill; he will find that such purchasers are protected by it.

MR. TAWNEY. Not against suits.

MR. LACEY. Let me ask the gentleman this question: Why should we give protection against suits and confirm the title in the remainder of the lands which the railroad company has not conveyed and which ought never to have been patented to it?

MR. TAWNEY. I am not in favor of that proposition. I have here a substitute for the amendment offered by the gentleman's colleague, and in my amendment it is provided expressly that the provisions of this act shall not apply to lands that are sold by a railroad company in good faith. This would leave the act applicable to all lands that are still held by the railroad company and which were granted by the General Gov-

ernment to the State for the benefit of the railroad company.

MR. LACEY. The last part of section 1 provides expressly that—

"No patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Now, in order to protect settlers still further, so that they might not even be required to go into court and make defense, the option has been given to them under sections 2 and 3 to simply file their statement with the Secretary of the Interior (if they want to avoid litigation), setting forth the fact that they are bona fide settlers; and then it is provided in express terms that no suit shall be brought in relation to those lands until the matter is first investigated in the Department; and if, after adjudication there, it is held that they are not bona fide settlers, that adjudication is not conclusive against them, but they can still make their further defense in the courts.

The committee has been very tender in behalf of these bona fide settlers and has endeavored to protect them, not only in the courts but out of the courts, and has provided means by which they may avoid going into the courts at all.

Mr. Speaker, I move the previous question on the amendment and the substitute.

MR. HEPBURN. I hope my colleague will not do that. I want to correct a misstatement which he has fallen into.

MR. LACEY. How much time does my colleague want?

MR. HEPBURN. Five minutes.

MR. LACEY. Very well; I withdraw the demand for the previous question and yield to the gentleman five minutes.

MR. HEPBURN. Mr. Speaker, the gentleman assures us that these suits will not be brought. Now, I know personally of an instance where, in the southern district of Iowa, the district attorney has been instructed to bring suit to recover some 25,000 acres of land. In order to bring any one of these suits, he says that it will be necessary for him to make parties to the suit all of the inhabitants of the town of Hastings, in Mill County, Iowa. There will be nearly 1,000 defendants in that suit alone. They can not recover without going through that process. It is true that no judgments will be rendered against any one of those persons by this fact, because they are bona fide holders; but they must appear in court and affirmatively show that fact. And my colleague ignores that condition of things entirely.

My colleague is in error again in another statement. The proposition I urged as an amendment to this bill does not do that which he says it will do. Whenever a mistake of fact has been made or a fraud perpetrated, actual or constructive, under my amendment suit may be brought. I only want to protect the settlers where there has been nothing of this sort, neither a mistake of facts nor a fraud of any kind. If fraud be found to exist, suits will be brought notwithstanding the adoption of my amendment. No lands are covered in the operation of this statute except, as I have said before, those issued under the rulings or construction of the Department, which has been continued from 1849 up to about 1875, twenty-

five years or more of a continuous, uniform construction, which they are now seeking to overturn by later regulations or rulings.

I do not think, Mr. Speaker, that this is fair, and I do not think it is just to the people. My friend from Iowa says that suits could not be brought in many cases. I assert that every man living in the Eighth Congressional district of Iowa who owns lands that were conveyed under any one of these grants will have reason to fear a suit if this bill becomes a law. He can not know what particular land the Secretary will select for the purpose of suits. Everyone will fear, and he will feel it incumbent on him to [1938] affirmatively show to the Secretary, in order to prevent action, that he is a bona fide holder. He will be put to that expense, and it will cost the people of my district tens of thousands of dollars to make this showing, and what I say of that district may be truthfully said of every district in the State of Iowa, in Nebraska, Missouri, Kansas, and in many parts of the State of Illinois.

Every Representative, Mr. Speaker, is interested, it seems to me, in behalf of his people in preventing this kind of litigation. If we adopt my amendment there will be no danger of that, and all the purposes the bill seeks to accomplish will still remain unimpaired.

Mr. HOPKINS. Will the gentleman in charge of this bill yield for a question?

Mr. LACEY. Certainly.

Mr. HOPKINS. Will the gentleman from Iowa state in a word what objection there is to the adoption of the substitute offered by his colleague from Iowa?

MR. LACEY. It is very simple and only this: If the amendment be adopted we may as well kill the bill. There would not be enough left to swear by, although there might be enough to swear at. [Laughter.]

MR. HEPBURN. Will not every case of fraud be still open to investigation under the bill?

MR. LACEY. I was trying to answer my friend from Illinois. The amendment amounts to this: That no patent shall be hereafter cancelled or annulled in behalf of the United States by suit except in cases where actual fraud is shown.

Now, hundreds of thousands of acres of these lands, by reason of departmental mistakes in construction of the law, have been patented to the railroad and wagon companies that never should have been patented to them. If the land has been sold we confirm the title of the purchasers from the companies. But if it has not been sold there is no reason why the company should retain it. That is the only difference between my colleague and myself. His proposition that we shall only go behind the patents in case of actual fraud would nullify this bill and also the act of 1887, which requires that all these railroad grants should be re-examined and readjusted in the light of the decisions of the Supreme Court.

MR. HOPKINS. Now, just a further question. If I understand you correctly, if the amendment of your colleague is adopted it will confirm in the railroad and wagon-road companies all lands that they hold patents to that have been issued by mistakes in the Department?

MR. LACEY. Certainly; every acre of them. Now, that ought not to be done, either.

MR. HOPKINS. And that will take away all chance of upsetting these titles or again acquiring title to that property.

MR. LACEY. We should not pass this bill after putting that sort of an amendment in it which will confirm all these mistakes, because the number of fraudulent patents is not very great. I yield five minutes to the gentleman from Nebraska [Mr. Andrews].

MR. ANDREWS. Mr. Speaker, the pending amendment affects the title to about 201,000 acres of lieu lands in the State of Nebraska. If there should be any disturbance of the titles held upon those lands the whole matter could be carried back to affect injuriously an equal amount of land in another portion of the State, and thus involve the interests of settlers on over 400,000 acres of land in the State of Nebraska. About 201,000 acres of land were accepted by a certain grantee, in lieu of other lands to which that grantee was entitled in the South Platte country. The lands accepted in the North Platte country, in the State of Nebraska, were, in some instances, less valuable than those in the South Platte country. Nevertheless, the grantee accepted these lieu lands rather than disturb the settlers who had filed homestead and other entries upon South Platte lands properly included in the grant to which I have referred.

MR. LACEY. May I ask the gentleman a question right there?

MR. ANDREWS. Certainly.

MR. LACEY. I should like to ask him whether he deems it important for the interests of this large number of settlers in the great tract of public lands in his district that this bill should go through, confirming these titles so as to protect them?

MR. ANDREWS. I do, Mr. Speaker, and I earnestly hope that the amendment proposed by the chairman of the committee will prevail. We have had an experience in Nebraska on a question like this, and I urge that no mistake be made in protecting our people from another experience so unsatisfactory to the settlers in the State of Nebraska. With this amendment, and another slight amendment that may be proposed later on, I earnestly hope that the bill may become a law. But, with the permission of the House, I desire to call attention to another important fact bearing upon this question.

The grant under consideration covers a period of about twenty-five years. Farmers have purchased lands under it and have invested the labor of almost a quarter of a century in the building of their homes.

If a period of ten years is sufficient to acquire title in other cases, why should not fifteen, twenty, or twenty-five years be sufficient for these pioneer farmers to secure absolute titles to their lands? Why should they be held in continued dread that they may be called into court to defend their titles?

They have earned their homes by the patient toil and struggles of years and should be given the absolute assurance that their titles will be confirmed without further delay.

MR. TAWNEY. I should like to ask the gentleman from Iowa if he has any objection to incorporating

in this bill a provision that will throw upon the Government the burden of proving in the first instance whether or not the sale from the railroad company to the purchaser was made in good faith, instead of putting the burden of proof of that fact, as the law of 1887 does, upon the purchaser in the first instance? The Government now proceeds upon the assumption that he is not a purchaser in good faith, and throws the burden of proof of ascertaining that fact upon the purchaser. I will ask the gentleman if he has any objection to a provision imposing upon the Government the burden of ascertaining as a condition precedent to its right to bring suit whether or not the settler is a bona fide purchaser? That will be a substantial protection to the actual, bona fide purchaser.

MR. LACEY. Why, certainly I have an objection to that. The law is very simple now, and if a bona fide purchaser is brought into court, he, above all persons in the world, knows his own innocence, and if he can not prove it—if he is afraid to go into court and prove it—it certainly is of a very doubtful character. Now, to have the presumption of innocence apply to all these cases would practically handicap the Government to the extent that it could never rectify any of these errors in patents.

MR. TAWNEY. The gentleman did not understand my question.

MR. LACEY. I understand it fully. You want to shift the burden of proof.

MR. TAWNEY. Only in cases where the land is certified erroneously; not where it is certified through fraud or misrepresentation. Only where the error has been committed by the officers of the Government, and

because of that error the land has passed into the possession of an actual, bona fide purchaser.

MR. LACEY. This bill absolutely confirms the title to all that kind of land, and the assumption that the Government will bring suits where it knows it will fail, where the officers of the Government know the act of Congress has confirmed the title, is an assumption of something that I do not think we shall ever be faced with in the future. I do not think the suggestion ought to be put into this bill.

Mr. Speaker, I move the previous question upon the amendment and the substitute.

THE SPEAKER. Does the gentleman move the previous question upon the bill?

MR. LACEY. There will be perhaps one other item of the bill to consider before the previous question is moved upon the bill. I move it upon the amendment and the substitute.

MR. TAWNEY. If the previous question is ordered upon the amendment and the substitute, and if the substitute offered by the gentleman is voted down, will it be in order then to offer another substitute for the amendment offered by the gentleman from Iowa?

THE SPEAKER. It will.

The previous question was ordered.

THE SPEAKER. The previous question is ordered upon the amendment offered by the gentleman from Iowa [Mr. Hepburn] and the amendment offered by the chairman of the Committee on Public Lands.

MR. TAWNEY. That is the substitute.

THE SPEAKER. It is an amendment to the amendment. The question is on agreeing to the amend-

ment to the amendment offered by the chairman of the Committee on Public Lands.

The amendment was agreed to.

THE SPEAKER. The question is on agreeing to the amendment as amended.

The amendment as amended was agreed to.

THE SPEAKER. Is there any other amendment?

MR. ANDREWS. I offer the amendment which I send to the Clerk's desk.

MR. LACEY. Has the amendment been agreed to?

THE SPEAKER. The amendment has been adopted as amended. The effect of it is the adoption of the amendment of the chairman of the Committee on Public Lands. The question now is on the amendment to the original proposition offered by the gentleman from Nebraska.

MR. ANDREWS. Mr. Speaker, this pertains to section 2. I misunderstood the section. I am not offering an amendment to section 1. My amendment relates to section 2.

THE SPEAKER. Is the proposition of the gentleman from Arkansas a substitute for the first section? [1939]

MR. LACEY. No, sir; it is a substitute for the entire bill, so that it will come up later on.

The Clerk read as follows:

"Amend by striking out all between the word 'be,' in line 9, and the word 'and,' in line 12 of section 2, and insert in lieu thereof 'more than the minimum Government price thereof.'"

MR. ANDREWS. Mr. Speaker, a moment's reflection will show that the terms of the bill would involve an inconsistency in some cases. For instance, $1.25

was the minimum Government price for certain lands which have been sold for less than that amount per acre. If the terms of the bill should go into effect, the maximum price in such cases would be 25 cents or 50 cents, while the minimum price would be $1.25. It would be very difficult to harmonize the provisions of the bill in practice if the wording should remain as it now stands. The amendment I have offered would, as a rule, require the grantee to pay to the Government the price at which he could have purchased the land from the Government in the open market.

Some of it may have been sold for more than the Government price, some of it for less. This amendment would leave the amount below the Government price, to be determined and adjudicated by the court. In my judgment, this plan would be far more reasonable than the one proposed by the terms of the bill.

THE SPEAKER pro tempore (Mr. Payne.) The question is on the amendment of the gentleman from Nebraska.

The amendment was agreed to.

MR. LACEY. Now, Mr. Speaker, I move the previous question upon the bill and the substitute offered by the gentleman from Arkansas.

The previous question was ordered.

THE SPEAKER pro tempore. The question is on the substitute offered by the gentleman from Arkansas.

The question was taken; and the Speaker pro tempore announced that the noes seemed to have it.

MR. MCRAE. Division, Mr. Speaker.

The House divided; and there were—ayes 42, noes 63.

MR. MCRAE. The yeas and nays.

The yeas and nays were ordered.

The question was taken; and there were—yeas 72, nays 151, not voting 132.

[Record of yeas and nays.]

So the substitute was rejected.

The bill was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time, and passed.

On motion of Mr. Lacey, a motion to reconsider the vote by which the bill was passed was laid on the table.

The title of the bill was amended so as to read: "A bill to provide [1940] for the extension of the time within which suits may be brought to vacate or annul land patents, and for other purposes."

[2067] SENATE

Monday, *February 24, 1896.*

ANNULMENT OF LAND PATENTS

MR. DUBOIS. I am instructed by the Committee on Public Lands, to whom was referred the bill (H. R. 5474) to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes, to report it favorably with amendments. I desire to make a brief statement regarding it.

Five years ago a bill was passed fixing the time within which the Government could bring suit against railroad companies to annul patents which had been issued fraudulently or erroneously. Unless the bill which I now report be passed by next Mon-

day, all those fraudulent and erroneous patents will be validated. The bill has been amended in some respects by the Committee on Public Lands, and it must go to the House of Representatives, pass there, and be signed by the President by next Monday. The bill is of sufficient importance for the President to have sent a special message to Congress in regard to its subject-matter.

I will say that the Senate Committee on Public Lands, with a full attendance, every member being present save one, who is out of the city, have considered the bill carefully, and have come to a unanimous agreement. This is a unanimous report from the Committee on Public Lands, and I ask unanimous consent, owing to the emergency, that the bill may now be taken up and put on its passage. I think there will be no opposition to it.

MR. CALL. Temporarily laying aside the pending measure.

MR. DUBOIS. Of course, temporarily laying aside the pending measure.

By unanimous consent, the Senate, as in Committee of the Whole, proceeded to consider the bill.

The first amendment reported by the Committee on Public Lands was, in section 1, line 7, before the word "years" strike out "ten" and insert "six"; so as to make the section read:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon-road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after

the date of the issuance of such patents, and the limitation of section 8 of chapter 561 of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

The amendment was agreed to.

The next amendment was, in section 2, line 19, after the word "States," to insert "against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made"; and in line 22, after the word "party," to strike out "of" and insert "to"; so as to make the section read:

"SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand

confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person or association of persons for whose benefit the certification was made, for the value of the land, as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections 3 and 4 of chapter 376 of the acts of the second session of the Forty-ninth Congress."

The amendment was agreed to.

MR. HOAR. I should like to ask the chairman of the committee a question in regard to the last amendment at the foot of page 2. Suppose the land has been conveyed to a bona fide purchaser; then I understand there is to be a judgment for the United States against the party who originally took the defective land grant, and has conveyed it to a bona fide purchaser; but the proposition is that there shall be a decree for the value of the land. Suppose some railroad company conveyed the land for $1.50 an acre at the time, or $2 an acre, or any other small sum, and this grant is

held invalid by reason of some technical or other objection; the railroad company conveyed the land for that price, and now there is a city on it, and the land may have gone up twenty times in value; is it the purpose of the bill to hold the original patentee liable in that case for the present value of the land; and if so, is it not establishing a rule that exists nowhere else in regard to the liability of a grantor?

MR. PASCO. The minimum Government price is the amount fixed in the bill, as the Senator will see by looking at the tenth line of section 2.

MR. HOAR. In a previous section there is a limitation. That answers the question.

MR. PEFFER. I have received a number of letters in opposition to the bill, but not having examined its provisions, I did not quite see the force of the objections that were made. It was my impulse when the bill was read to object to its consideration, but after having conferred with a number of the members of the Committee on Public Lands, in whose judgment I have very great confidence, I have concluded not to raise the objection. However, I wish to make this statement in order that the objectors may understand that I have given the matter some consideration before letting the bill come to a vote.

MR. CALL. I should be glad to hear a statement made by some member of the committee who is familiar with the bill, which is a very important one. If it merely extends the limitation of time within which suits may be brought where lands have been fraudulently, erroneously, and unlawfully conveyed to corporations, I have no objection to it. I shall vote for the bill, as I understand the matter, but reserving

the right to move a reconsideration of the vote if I find that the sections are not of that character.

MR. BERRY. I will state to the Senator from Florida [Mr. Call] that in 1891 Congress passed an act requiring that all suits brought by the Government to annul patents should be brought within five years. That time will expire on the 3d day of the coming month, March. While the Land Office has done all that it has been possible to do to bring those suits within that time, it has been unable to bring all the suits that the officials believe should be brought, and the President of the United States called the attention of Congress to the matter, recommending that the law be repealed or at least the limit extended.

The other House has passed the pending bill. It sought in it to protect all innocent purchasers, bona fide purchasers, so as not to subject them to suits by the Government. The bill extends for five years the time within which the Government may bring suit to set aside any of the grants to the various railroad corporations of the country where the lands are still under the control or in the possession of the railroad company. That is the object and the purpose of the bill. There are a number of details by which innocent purchasers may apply to the Secretary of the Interior and have their titles confirmed where there is shown to be any question.

Now, I will state frankly that I should have preferred to repeal the act of 1891 out and out, and leave no question whatever. But that is impossible. This is a House bill, and it is this or nothing. If the pending bill is not passed and signed by the President before next Monday the limitation enacted in 1891

will have attached and it will be claimed, at least, whether it is the law or not, that the title, however fraudulent it may be, to the railroads will be confirmed. I think it is absolutely important that the bill should be passed and passed this evening, and so think all the other members of the Committee on Public Lands.

The bill was reported to the Senate as amended, and the amendments were concurred in. [2068]

The amendments were ordered to be engrossed, and the bill to be read a third time.

The bill was read the third time, and passed.

[2169] HOUSE OF REPRESENTATIVES

Wednesday, *February 26, 1896.*

ANNULMENT OF LAND PATENTS

THE SPEAKER laid before the House a bill (H. R. 5474) to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes, with amendments of the Senate thereto.

The amendments were read.

THE SPEAKER. The question is on agreeing to the Senate amendments.

MR. MCRAE. Mr. Speaker, I object to the first amendment, and shall ask a separate vote upon it.

THE SPEAKER. The Clerk will report the amendment.

The amendment was read, as follows:

"Page 1, line 7, strike out 'ten' and insert 'six'; so as to make the clause read: 'Shall only be brought

within six years of the date of issuance of such patent.'" [2170]

MR. MCRAE. Mr. Speaker, this bill as it passed the House contained very unusual provisions. It proceeds upon the theory that it is an extension of section 8 of the act of March 3, 1891, which provides as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

Now, the first section of this bill as passed by the House—and passed in response to the special message of the President asking for legislation upon this subject—provides not for the extension of the statute which I have read, but it limits that statute to two kinds of patents, to wit, those based on railroad and wagon-road grants. The bill as passed by the House left the five years limitation as it was in the act of 1891, but changed the limitation for future patents "therein referred to," railroads and wagon roads, from six to ten years. Having refused to permit any corrections for fraud or mistake except as to railroad and wagon-road grants, we are now asked to limit the time as to these to only six years. I am perfectly satisfied, from the testimony before the committee during the consideration of this bill, that the grants which ought to be examined and adjusted can not be properly examined within the time fixed by the Senate amendment. Indeed, I doubt whether the work can be done within the time fixed by the bill as it passed the

House. Therefore I am opposed to the change from ten to six years.

If this bill becomes a law it introduces into the Department and into the courts an entirely new proposition for consideration in adjusting and dealing with these land grants. By the act of March 3, 1891, Congress was content with a statutory limitation and trusted that act to give to the purchasers all of the rights that were granted them not in conflict with settlers. But here is a proposition to limit the right of investigation to two kinds of grants, and while it pretends to do this, at the same time it in effect proceeds to confirm them, for it provides that "no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title to such purchaser is hereby confirmed." This is done without regard to amount and without restriction as to the time of the purchase, and the good faith is not required to be shown beyond the holder of the land.

MR. MCMILLIN. Do I understand the gentleman from Arkansas to say that the Senate amendment, as now proposed to be concurred in, would not give the relief that was sought by the President and the Land Department and which was the special object of the bill proposed by the House?

MR. MCRAE. I think that would be the effect; at least it would so reduce the time allowed for the examination and adjustment of these grants as to make it practically impossible to do so with the present force allowed the Department.

This bill, I say, Mr. Speaker, would introduce a new subject of inquiry for the Department—that of investigating the claims of all persons who claim to be

bona fide purchasers. The lands have been or will be all sold by the railroads, and of course the purchasers will allege their own good faith, and under this bill nothing can be done until these questions are settled. With this additional duty upon the Department of the Interior time becomes important, and I venture to predict that all of the time that is prescribed by the Senate amendment will be taken up in the consideration of the claims of those persons who allege that they are bona fide purchasers from railroad companies, and the errors and frauds of the grants themselves will be practically untouched at the end of six years, thereby defeating the declared object of the bill; and under the mandatory terms of the bill the Department can not prevent it.

And so, Mr. Speaker, we find ourselves with a bill, the alleged object of which is to extend the time of the Department to adjust the grants, while at the same time it contains a declaration that they shall be confirmed by the affirmative action of the Department or by the judgment of the courts, if they elect to go into court; and so, instead of canceling the fraudulent patents, the effect of the bill, if the amendment be adopted, will be to confirm all of the land that may hereafter be, or that has been heretofore, sold to bona fide purchasers. It invites collusion and legalizes fraud of the worst character.

The bill may be a little better than nothing; but I think the principle we surrender in order to get it is worth a great deal more than all the land that will ever be recovered under its loose and dangerous provisions. In short, the bill when stripped of all verbiage helps no one except the purchasers of railroad

lands, and it does this in utter disregard of the rights of the Government and of the settlers who claim under the public-land laws. Perfect and complete immunity is given the railroads against suits for fraud and errors in patents for lieu lands by the proviso to the first section of the bill, and this is substantially all they want and all they ask.

Mr. Speaker, I can do nothing except to warn Congress of the danger of any such legislation. My colleague on the committee, the gentleman from Alabama [Mr. Underwood], and myself sought to do this when the bill was pending in the House, and now, as the majority is about making this dangerous and unusual experiment, I appeal to you to give the Department the longest time to investigate. According to the progress made during the last five years in the investigations of these grants it would take sixteen years to make the adjustments, unless the Committee on Appropriations shall see fit to increase the force of the General Land Office. I admit that we can not reach what in my judgment is the fatal defect of the bill by nonconcurring in the Senate amendment, but we can at least make an effort to secure for the Department and for the President, who are charged with the investigation of the grants, the time which the House has already voted to give for that purpose.

For my own part I do not believe that there ought to be any limitation against the Government, but if there is let it be a reasonable one, so that the work may be done correctly. If we pretend to do something, let us not at the same time so construct the bill as to prevent its accomplishment. No; you had better throw off all disguise and say to the railroads, take

the grants, sell the lands, get what you can for them, without fear of investigation. That is what you have done indirectly, and you furnish all the machinery for obtaining executive or judicial confirmation if thought necessary. The bill gives authority to the Department not to purge the grants of fraud, but to require it to stamp the seal of confirmation upon all of the lands that are held by bona fide purchasers, notwithstanding they may appear upon the records to be covered with fraud, although claimed by settlers under our land laws. The bill is in the interest of the railroads and not the settlers.

I hope the amendment will be nonconcurred in.

MR. LACEY. Mr. Speaker, I do not desire to follow my colleague upon the committee——

MR. BARNEY. I would ask the gentleman from Arkansas is there not great fear, unless we concur in the Senate amendment, that the statute of limitations will expire on the 3d of March next, and that therefore there is urgent necessity for our acting at once in this matter?

MR. MCRAE. I think there is no danger of defeating the bill, because if we nonconcur the bill will go into conference, which can be held today or tomorrow, and we can thereby make at least an honest effort to get the time fixed in the House bill.

MR. LACEY. Mr. Speaker, I do not wish to follow my colleague upon the committee in discussing the merits of the original proposition. Substantially the only thing that is now before the House is this proposition of the Senate to strike out "ten" and insert the word "six." In the existing law, the act of 1891, which has not been repealed, but which is still in full

force, it is provided that all suits on patents theretofore issued shall be brought within five years from that time, and that on patents thereafter to be issued the time shall be limited to six years. The House bill changed this time of six years to ten. The amendment of the Senate is to strike out the word "ten" in the House bill and adopt the original law of six years. Six years would then be the time in which the Government can hereafter assail a patent. That, it seems to me, is ample time. The Government officials will be more careful hereafter, with the experience they have had; and with the aid of the published adjudications of the Supreme Court they will be enabled with greater accuracy to adjust these patents, and hereafter the questions are not so likely to arise; but six years certainly will be ample to set aside all patents that may hereafter be assailed after being issued.

MR. MCMILLIN. Will the gentleman allow me to ask him a question?

MR. LACEY. Certainly.

MR. MCMILLIN. Do you concede the statement made by the gentleman from Arkansas, that the passage of this bill surrenders the rights of the Government to all except two classes of grants?

MR. LACEY. It does not surrender anything; it only makes an extension of time.

MR. MCMILLIN. Do you extend that to any except two?

MR. LACEY. The extension of time as recommended by the President in his message would have limited it to wagon-road grants and railroad grants, but the Senate has also included canal grants, there

being also a small grant for that purpose involved. In the message of the President no statement was made as asking specifically for additional time with reference to patents to private individuals, such as desert-land claimants, homesteaders, and pre-empters, and the whole object of the message seemed to be to get unlimited time in which to assail the land grant patents to railways and like patents; and this limitation is now extended by this bill five years longer, and the Senate says as to future patents six years, instead of ten years, as the House bill provided, shall be the time.

MR. MCMILLIN. Will the gentleman permit me to ask him one more question?

MR. LACEY. Certainly.

MR. MCMILLIN. What is the objection to getting a conference on this bill, and trying, if you can, to get some of the r lief that the gentleman from Arkansas insists ought to be obtained? [2171]

MR. LACEY. Because I do not want the relief asked by the gentleman from Arkansas.

MR. MCMILLIN. Then you are not in favor of the House bill?

MR. LACEY. I am opposed to the proposition of the gentleman from Arkansas.

MR. MCMILLIN. Do I understand the gentleman to say that he is not in favor of the House bill as it passed?

MR. LACEY. I voted for the House bill. My own preference, if I could have had it, would have been to change this so as to make it five instead of ten years, but the committee made it ten years. Yesterday the matter was laid before the committee and it

agreed to the Senate amendment, with the exception of my friend and perhaps some others. At any rate, the majority of the committee were in favor of accepting the Senate amendment.

Now, Mr. Speaker, there is no necessity for extending the present limitation of six years to ten years as to future patents. The real contention between the gentleman from Arkansas and myself is this: He favors unlimited repeal of all limitation laws, so as to enable the Government in the future, at its will at any time, to file a bill to attack and to set aside any patent that may be issued of any kind, to a private individual, to a railway, or to a canal; on the other hand, the majority of the committee contend there ought to be a limit as to these things; and where land has been sold to outsiders, to an innocent purchaser, that their rights should be confirmed and that they should be relieved from litigation. That is the ground upon which we are divided. This mere question as to whether there should be ten years or six years in the future is not very important; and this bill must pass now substantially, if at all, because the limitation will expire next Monday, and if we go into a conference the chances are that this bill may be defeated.

MR. MCMILLIN. But the gentleman forgets that a conference report is privileged and can be presented at any time, and even supervenes a motion to adjourn.

MR. LACEY. Certainly; I understand that.

MR. MCMILLIN. And there is not the danger that the gentleman apprehends from allowing this matter to go over for the present.

MR. LACEY. If there were anything in the action of the Senate which I thought ought to be changed, I should ask a conference; but I think, on the contrary, if we were going to change the word "six" it ought to be made "five" instead of "ten."

MR. MCMILLIN. But is there not danger of the bill failing by your opposition to the House measure?

MR. LACEY. Not at all. I am not opposed to the House bill. At the same time I did not regard every feature of that bill as perfect. For instance, the word "canal" has been inserted—a change which I think it well to make, as it appeared before the Senate committee that there was one canal grant which ought to be adjusted.

MR. NEILL. Do I understand the gentleman to say that he thinks there ought to be a statute of limitations as to fraud in favor of these railroad companies?

MR. LACEY. Not at all. There is a limitation now of so many years in which to adjust their grants.

MR. NEILL. Yes, sir.

MR. LACEY. Suit can be brought within five years. We are proposing to give five years more; and it is important to the gentleman's State and to other States that there should not be clouds cast upon the titles of patented lands, the great bulk of which have been heretofore sold and have passed into the hands of settlers. Even though there may have been actual fraud twenty, thirty, or forty years ago in reference to some of these grants, yet after patents have been issued there should be some limitation as to the time within which the Government should exercise activity and determine what patents, if any, are fraudulent or

wrong, in order that suits may be brought, the facts determined, and facilities offered for settling up that country.

MR. NEILL. Mr. Speaker, will my colleague, chairman of the Committee on Public Iands, yield to a question? I desire to ask the gentleman if he thinks there should be any statute of limitations against the Government for the protection of titles acquired by frauds?

MR. LACEY. I think it is. I think five years enough. There are only 60,000,000 acres of unadjusted lands; 12,000,000 acres were adjusted last year. At that rate all these controversies can be adjusted inside of five years. But if five years should be found inadequate a further extension of one or two years might be granted by a supplemental act of Congress. But let me state to the gentleman from Arkansas that if we now give ten years the Interior Department will not touch this matter during the next five or six years; whereas if we now give only five years the work will be continued with the present activity. The Department has adjusted more grants of land during the last year (being the final year of the five already granted) than it adjusted within the previous three.

MR. NEILL. Mr. Speaker, the chairman of the committee [Mr. Lacey] has not convinced me, and I hope he has not convinced other members of the House, of the justness of his position. The railroad companies have had all the advantages in this matter. I know that such has been the fact in my State. Now we are asking something in behalf of the people, for whom the public lands should be held.

THE SPEAKER. The gentleman from Iowa [Mr. Lacey], as the Chair understands asks the previous question.

MR. LACEY. I withdraw the demand for a moment and yield five minutes to my colleague on the committee, the gentleman from Alabama [Mr. Underwood].

MR. UNDERWOOD. Mr. Speaker, I do not wish to detain the House with any lengthy discussion of this bill. When the bill originally came before the House I opposed its passage in the form in which it now stands. I then gave my reasons why I thought it was better to have no limitation as to the forfeiture of these public lands where the patentees have obtained them by fraud or mistake. But the House saw fit to extend for a certain number of years the time within which forfeiture could be had rather than repeal the statute of limitations entirely. The bill went from this House fixing that limitation at ten years. It now comes back from the Senate with the limitation fixed at six years.

I consider there is every reason why the time should be extended as far as possible if we are going to have any limitation at all. I wish to call the attention of members of the House to the facts that were developed before the Public Lands Committee in the investigation had during the consideration of this bill. We then had before the committee the officers of the Public Land Department. They were examined as to the forfeiture of these public-land grants. It was disclosed in that investigation that there was in the Public Land Department but one set of books that could be inspected in the determination whether or

not it was proper to forfeit these public-land grants, and it was developed that only a certain number of men could be employed in the examination of those books, so that necessarily the time for investigation must be extended or these men could not get at the facts and determine what grants had been acquired by fraud or mistake and what grants had been acquired properly.

Furthermore, on the investigation of the facts before the Public Lands Committee the officers of the Public Land Department in testifying before the committee stated that at the rate at which they had progressed in the past, sixteen years more would be required to examine and inquire into these public-land grants. And with the testimony before the committee stating that it would take sixteen years to examine this question and determine whether the Government of the United States was going to be deprived of land that properly belonged to it, we had fixed in our original bill ten years for the forfeiture of grants in the future. Well, now Mr. Speaker, if these officers, who are limited in their investigation to one set of books, whose numbers are necessarily limited, are held down to the investigation of the past grants, how in reason can they examine into the validity of the grants that are occurring now? You see that the cutting down of this time will absolutely deprive the Department of a full opportunity to investigate the rights of the Government of the United States and determine whether land is being taken away from it that properly belongs to the Government. For that reason I think the House should nonconcur in the Senate amendment, and we should insist on standing on the bill as it left the House and went to the Senate.

MR. MCMILLIN. Mr. Speaker, I would be obliged to the gentleman from Ohio [Mr. Lacey] if he would withhold his demand for the previous question for a moment.

MR. LACEY. How much time does the gentleman want?

MR. MCMILLIN. Only a few minutes.

MR. LACEY. I yield three minutes to the gentleman from Tennessee, and will give him more time if he needs it.

MR. MCMILLIN. Mr. Speaker, under the statement that has just been made by the gentleman from Arkansas [Mr. McRae] and the gentleman from Alabama [Mr. Underwood], it strikes me there is only one decent way of doing this business, whatever we are going to do, and that is to let this matter go to conference, and let the conference committee report to this House the best they can do. There is no danger that this bill will be lost if there is any strenuous effort to save it. The time does not expire until next Monday. Conference reports take precedence of everything else and are about the only thing that can take precedence, even of a motion to adjourn. Only a few days ago the Committee on Public Lands brought into this House a proposition saying that ten years was short enough time for this limitation. The Commissioner of the Land Office estimated at that time that it would take sixteen years to do the work, and yet today we are called upon to surrender, not simply the six years between ten and sixteen, but to surrender four years of the time that the committee itself said we ought to have when they reported this bill. Now, if there have been frauds in connection

with the disposition of these lands, they ought not to be covered up. There ought to be no legislation to condone those frauds, but every effort in behalf of the people should be made for the free, fair, and full investigation of the question.

For one I insist that no ill can come from letting this go to conference, and if gentlemen want to rush it through in hot haste, if they are determined to have legislation that shall benefit the [2172] people who have profited by these frauds, rather than benefit the people who are entitled to these lands, let the country know who is doing it. I do not believe this bill should be rushed through, when the inevitable result will be to curtail the time for the Government to have justice done.

MR. LACEY. Mr. Speaker, I demand the previous question.

The question was taken; and the Speaker announced that the noes seemed to have it.

MR. LACEY. Division.

The House divided.

MR. MCMILLIN. We withdraw the demand, and will take the vote on the proposition itself.

THE SPEAKER. The Chair announced that the noes seemed to have it. The gentleman from Iowa [Mr. Lacey] demanded the division.

The House divided; and there were—ayes 120, noes none.

So the previous question was ordered.

THE SPEAKER. The question is on concurring in the first amendment.

The question was taken; and the Speaker announced that the noes seemed to have it.

MR. LACEY. Division.

The House divided; and there were—ayes 87, noes 43.

MR. MCRAE. Mr. Speaker, I demand the yeas and nays.

MR. LACEY. I should be glad to have this amendment reported. I think perhaps there is some misapprehension as to the amendment before the House.

THE SPEAKER. The gentleman asks unanimous consent that this amendment be reported again. Is there objection?

There was no objection.

The Clerk read as follows:

"Page 1, line 7, strike out 'ten' and insert 'six'."

THE SPEAKER. The gentleman from Tennessee demands the yeas and nays.

MR. MCMILLIN. The gentleman from Arkansas [Mr. McRae] demands the yeas and nays.

The question was taken; and there were—yeas 156, nays 93, not voting 106.

[Record of yeas and nays.]

So the amendment was concurred in.

The remaining Senate amendments were then concurred in.

On motion of Mr. Lacey, a motion to reconsider the vote by which the Senate amendments were concurred in was laid on the table.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 686.

EXPLORATION COMPANY, LIMITED, AND
PHILIP L. FOSTER,
APPELLANTS,

VS.

THE UNITED STATES OF AMERICA,
APPELLEE.

On Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

MOTION BY THE APPELLANTS TO ADVANCE.

The appellants above named respectfully move that this case be advanced for early hearing because of the importance, not only to both parties hereto, but to the lower federal courts and litigants therein, that the question at issue be settled at an early date, and because of the public character and importance of such question.

The Matter Involved.

A statute of the United States in effect since 1891 provides:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought *within five years from the passage of this act*, and suits to vacate and annul patents hereafter issued shall *only be brought within six years after the date of the issuance of such patents.*" (Italics ours.)

26 Stat. at Large, pp. 1095, 1099.
29 Stat. at Large, p. 42.
2 U. S. Comp. Stat. (1913), Secs. 5114, 4901.

Does this statute mean what it clearly says, or, in the case of patents procured through so-called "dummy" entries, and therefore illegally, is the commencement of the six-year period "the date of the issuance of the patent" or the date when the government discovers the alleged fraud? Or does the statute apply at all to such cases?

Summary of the Record.

On March 3, 1911, the government filed its bill in the Circuit (now District) Court for Colorado against the present appellants to cancel and annul nine patents to coal lands in Gunnison and Delta Counties, Colorado, aggregating 1,120 acres, these patents being (both as alleged and in truth) dated September 6th or October 16th, 1902, more than eight

years before the suit was instituted. The bill charged not only that the entries were made through fraud and were therefore illegal, but that through various specified acts the defendants had actively concealed the alleged fraud after patents had issued.

The defendants demurred to the bill, raising the bar of the statute. The Circuit Court sustained the demurrer (*U. S.* v. *Exploration Co.*, 190 Fed., 405), and dismissed the bill.

The government appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which, on January 13, 1913, reversed the action of the lower court (*U. S.* v. *Exploration Co.*, 203 Fed., 387), holding that by its allegations of fraud and concealment the government was not foreclosed by the statute.

This decree not being final, but providing that the defendants should answer and the case proceed, no review thereof in this court was permitted.

The defendants answered, still claiming the benefit of the statute, and on final hearing the District Court for Colorado entered a decree in favor of the United States cancelling all of the patents in question (*U. S.* v. *Exploration Co.*, 225 Fed., 854). The trial court found that the allegations of the bill respecting the unlawful patenting of the land through "dummies" were established, and that as the government had not discovered the true facts until shortly before the suit was brought, it was not barred. It found, however, that there was no active concealment of the alleged fraud subsequent to the issuance of the patents. On the contrary, the court said (225 Fed., p. 854, 856):

> "The court also finds that the defendants did not actively conceal the facts which con-

> stitute the frauds in this case, by enjoining silence on the entry men and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the government, but were only guilty of a passive concealment."

From this decree an appeal was taken to the Court of Appeals for the Eighth Circuit, which, on August 2, 1916, rendered its opinion (not yet reported) affirming the decree. The decree of the Court of Appeals having been entered on September 4, 1916, the present appeal has been perfected and the record is now before this court.

While there are one or two other matters involved, the principal question is whether the patents could be attacked by suit instituted more than six years after their dates. The appellants contend that they could not, asserting, as this court said in *U. S.* v. *Winona, etc. R. Co.*, 165 U. S., 463, 476, that

> "Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the *frauds and misrepresentations of the patentee were*, the patent would become conclusive as a transfer of title, providing only that the land was public land of the United States," etc. (Italics ours.)

Reasons for Advancing the Cause.

It is especially important to these appellants that the question be settled as speedily as possible. The litigation over these titles has covered a period of

more than five years. The property involved is annually assessed for taxes by Gunnison and Delta Counties, Colorado, and there are heavy penalties prescribed for failure promptly to pay these taxes. Furthermore, after default in payment, the county treasurers annually sell the property for delinquent taxes, and interest and other penalties required as conditions to redemption are onerous. So long as the decree of affirmance stands, the present appellants must either leave the taxes unpaid and allow the property to be sold, or pay the same and run the risk of losing all of such payments, should the decree be affirmed.

But over and above the foregoing reasons personal to the appellants, it is a matter of much consequence not only to the government, but to many other litigants or prospective litigants that the meaning and effect of the foregoing statute be promptly and forever settled, if it has not already been (as appellants have always contended) by the *Winona* case, *supra*, and, inferentially, by *Burke* v. *Southern Pacific R. Co.*, 234 U. S., 669, 693. The question was argued before this court in *Linn & Lane Co.* v. *U. S.*, 236 U. S., 574, but was not determined therein, as the case was decided on other points. The same question has been raised and discussed in other cases in the district courts, as will be apparent from the following decisions:

U. S. v. Lee Wilson & Co. (D. C. Ark.), 214 Fed., 630, 649.

U. S. v. Puget Sound Co. (D. C. Wash.), 215 Fed., 436.

U. S. v. Southern Pac. Co. (D. C. Calif.), 225 Fed., 197, 201.

In each of these cases the courts were constrained to follow the decisions of the Court of Appeals for the Eighth Circuit on the first appeal in the case now at bar and of the Court of Appeals of the Ninth Circuit in *Linn & Lane Timber Co* v. *United States,* 196 Fed., 593; 203 Fed., 394; but the courts seem to differ as to the effect of the statute when asserted as a defense to a suit such as this. In the *Lee Wilson* case, *supra,* it is said (214 Fed., 649) that "in case of concealed fraud, the statute does not begin to run until the discovery of the fraud." In the *Southern Pacific* case, *supra,* the court says (225 Fed., 201) that the statute "has no application in such a proceeding as this." In the *Puget Sound* case it is said (215 Fed., 440) that "it is a concealment of this cause of action that is the material point to the inquiry here." And the Court of Appeals in the last opinion in the present case goes farther and holds that active concealment subsequent to patent is not important; and mere ignorance of the government of the true facts avoids the statute.

We are advised that some of these cases, as well as others, are pending and undetermined in the national courts of the western states. Unless and until there be a final adjudication by this court it is manifest that there will be uncertainty as to the rights of the government and private parties in numerous controversies wherein the same question arises, with resultant expense of litigation which this court's early opinion may forestall.

Practically the entire basis of decision by the Courts of Appeal of the two circuits in the cases above mentioned, particularly the case at bar, is found

in *Bailey* v. *Glover*, 21 Wall., 342, which passed upon a statute prescribing the limitation as running "from the time the cause of action accrued." As appellants contend, the reason for the rule applied to such a statute is, as stated in *Kirby* v. *Lake Shore Railroad*, 120 U. S., 130, 138, that the cause of action is not deemed to accrue until the fraud is or should have been discovered; and this construction cannot be applied to the statute they rely upon.

We make the foregoing suggestions, not by way of present argument, but to emphasize the necessity of a construction by this court of its own prior decisions.

Stability of titles and the importance of uniformity of rulings in such cases both require that the question at issue be settled as promptly as possible.

Respectfully submitted,

HENRY MCALLISTER, JR.,
GEORGE E. TRALLES,
Solicitors for Appellants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

EXPLORATION COMPANY, LIMITED, and PHILIP L. FOSTER, *appellants*, *v.* THE UNITED STATES. } No 277.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This appeal of the Exploration Company, Limited, and Philip L. Foster, allowed September 5, 1916 (R. 164), is from a decree of the Circuit Court of Appeals for the Eighth Circuit, entered September 4, 1916 (R. 160), affirming a decree of the District Court for the District of Colorado, entered August 25, 1915 (R. 38), cancelling nine coal-land patents for 1,120 acres of public land in Colorado, which had been procured by fraud, and also cancelling deeds of the same land through various persons to Foster in secret trust for the Exploration Company, a foreign

corporation, for whose benefit the fraud was perpetrated.

Six of the patents were dated October 16, 1902, and the other three were dated September 6, 1902 (R. 39). The suit was brought March 3, 1911 (R. 15). Section 8 of the act of March 3, 1891, 26 Stat. 1093, 1095, 1099, provides:

> That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

As this suit was brought about eight and one-half years after the dates of the patents sought to be annulled, facts were alleged in the bill to the effect that the fraud by which the patents were obtained was self-concealing in its nature, was concealed from the Government by the wrongdoers and was not discovered until 1909, after which the work of investigation and preparation for suit proceeded with diligence until the suit was brought March 3, 1911 (R. 13).

The defendants demurred on the ground that the suit was barred by the statute of limitations (R. 16), and the demurrer was sustained by the District Court (R. 19). The Court of Appeals reversed this decision and allowed the defendants to plead (R. 20). They answered denying the fraud, its self-concealing nature and its concealment, and pleading the statute

of limitations in bar (R. 22–37). Testimony was taken (R. 43–136), and both the lower courts found the issues in favor of the Government.

The fraud, alleged in the bill and shown by the testimony, was that the Exploration Company, a foreign corporation and therefore not qualified to purchase public coal lands, acting through secret agents, procured various individuals to make and perfect these coal land entries and obtain the patents in question for its benefit, and then procured the titles so obtained to be conveyed to secret trustees in whose names they were held until after the period of limitation had expired, in violation of sections 2347 to 2350 of the Revised Statutes.

Findings of fact.

The findings of the District Court were as follows (R. 147–150):

> The defendant, which will be referred to herein as the Exploration Company, is a corporation existing under the laws of Great Britain, authorized by its articles of incorporation, to purchase, own, and operate mines, and purchase and own shares of stock in mines in all parts of the world. That it was the owner of mines and mining lands in different parts of the world, and also of the shares of corporations engaged in mining in the United States and other countries. In 1901, and for several years thereafter, it had a representative in the United States by the name of Charles A. Molson, to whom it had executed a general power of attorney to

represent it in all matters in the United States. This agent resided at Salt Lake City, Utah. The Exploration Company, being desirous of acquiring coal lands in the State of Colorado, which were a part of the public domain of the United States, and being unable to do so, by reason of the fact that it was a foreign corporation, and besides, desiring more of these coal lands than it could, even if it were a domestic corporation, obtain under the laws of the United States, it conceived and carried into effect the following scheme for the purpose of acquiring them:

Mr. Molson employed one Henry Burrell to obtain the title to these lands. Burrell employed other agents, who were sent to residents of the State of Colorado, who, under the laws, could acquire public coal lands from the United States, and induced them to make entries of such lands as were pointed out to them by these agents of the Exploration Company, and which were supposed to contain valuable veins of coal. A large number of such entries were made on such lands, which were lying in the counties of Gunnison and Delta, the parties filing declaratory statements, as required by law. Many of these lands thus filed on were abandoned and no patents applied for, as upon investigation, they were found not to contain sufficient coal to justify their purchase, but the filings on the lands in controversy were paid for and patents therefor secured. Henry Burrell was a witness in most, if not all, of these entries. The parties who made these entries were promised the sum of twenty-five dollars for their

services. All fees, as well as the purchase money, were to be paid by Burrell with money furnished by the Exploration Company. As soon as the final proofs were made and the money paid by the agent of the Exploration Company, to the respective officers of the land offices within whose jurisdiction the lands were situated, the entrymen and women executed deeds of conveyance for their respective tracts of land and delivered them to Henry Burrell. These deeds Henry Burrell caused to be made to Alexander Burrell, his brother. Some time later Alexander Burrell conveyed these lands to one Albert L. Smith, a banker in Helena, Montana, without any consideration except the promise of Smith to hold them in trust for and to convey them to any person designated by the agent of the Exploration Company. Charles A. Molson, the agent, having died, the Exploration Company appointed the defendant Philip L. Foster as its general agent in the United States, with a power of attorney to act generally in its behalf. Thereupon Albert L. Smith, at the request of the defendant's agents, conveyed these lands to Mr. Foster without any other consideration. The legal title has ever since been in Mr. Foster, who holds it in secret trust for the Exploration Company.

The patents to these lands were issued by the Government in September, 1902, but the fact that they were secured by false affidavits, and not for the benefit of the entrymen and women, but for the sole benefit of the Exploration Company, and that the purchase money

paid to the Government, was the Exploration Company's money, was kept secret, and did not become known to any of the officers of the Government, nor did any facts become known to them which could arouse the suspicion of one exercising reasonable diligence that the patents to these lands had been obtained by false affidavits and for the benefit of the defendant Exploration Company, until 1909, more than six years after the patents had been issued, and then it only became known to the officers of the Government by reason of the fact that a Utah corporation had acquired a great many of the public coal lands, in the same manner as these lands were obtained, and that being discovered in 1909, the Secretary of the Interior directed in that year an examination of all coal entries made in the States of Utah and Colorado. When these investigations were made, the facts were for the first time discovered, as hereinbefore recited. There was nothing in the records, or on file in the General Land Office of the United States or the Department of the Interior which could possibly have aroused a suspicion that these lands had been obtained for the benefit of the Exploration Company, until the reports of the special agents of the General Land Office were made the latter part of 1909. As soon as the facts were ascertained, the Secretary of the Interior transmitted them to the Department of Justice, with the request to institute suits, to set aside the patents, and this suit was filed on March 3, 1911, within several months less than two years after the discovery of the alleged fraudulent acts.

The court also finds that the defendants did not actively conceal the facts which constitute the frauds in this case, by enjoining silence on the entrymen and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the Government, but were only guilty of a passive concealment. When the investigation was made by the special agents of the General Land Office, in 1909, in relation to these entries, the patentees, as well as the company's agents, stated the facts truthfully, but until that time the fact that the entries were all made for the benefit of the company and that the legal title held by the defendant Foster was for the benefit of the Exploration Company, was concealed; nor were there any facts or circumstances within the knowledge of any official of the Government, prior to the investigation in 1909, which could arouse even a bare suspicion that these entries were made in the manner and for the benefit of the Exploration Company, as hereinbefore set out.

The District Court also said in its opinion (R. 152):

That these lands were obtained for the benefit of the foreign corporation, which could not obtain them, under the law, was successfully concealed.

The Court of Appeals said in its opinion (R. 159):

We have carefully considered the evidence taken at the trial and find that it fully supports the findings of the trial court.

And again (R. 159):

> In the case at bar the defendants did not advertise the fact that they were committing a fraud nor did they discuss the fraud among themselves in the presence of others, but the manner in which the fraud was committed constituted all the concealment that was necessary. After it was supposed the statute of limitations had barred any action the participants in the fraud talked very freely, telling the truth when it was thought it would do no harm. The findings of the trial court, in our judgment, are fully sustained by the evidence and the findings sustain the decree rendered.

Opinions below.

On the demurrer: District Court, Lewis, 190 Fed. 405; Circuit Court of Appeals, Sanborn, Carland and W. H. Munger, 203 Fed. 387.

On the evidence: District Court, Trieber (R. 147), 225 Fed. 854; Circuit Court of Appeals, Smith, Carland and Amidon (R. 159), 235 Fed. 110.

The question presented.

Whether the courts below erred in holding that this suit was not barred by the statute of limitations.

The rule of concealed fraud.

When the object of a suit is to obtain relief against a fraud, concealment of the cause of action by the wrongdoer suspends the bar of the statute.

This is an old and familiar rule of law and equity, as binding on the courts of the jurisdictions in which it prevails as any statute ever enacted by a legisla-

tive body. It is applied in mitigation of the strict letter of the limitation statute as if it were written there in the form of an exception to its general language.

The reason of the rule is that statutes of limitation are designed to prevent the wrongful assertion of rights after the evidence to repel them has been impaired by lapse of time, and therefore it could never have been intended by any general words of limitation to provide an instrument for the encouragement and promotion of wrong.

The rule in courts of law.

The first inquiry should be whether the rule has been applied in courts of law as well as in courts of equity. This is of first importance because the application of the rule in courts of law must demonstrate its character as a rule of substantive law, not repealed by any general words, however positive and inelastic, but to be read along with them and in modification of them.

This question, whether concealment of a fraud avoids the bar of a general statute in an action at law, goes to the foundation of the opposing argument. Counsel assert that the rule has never been applied in courts of law unless the statute under consideration contained an express exception of concealed fraud, and that it has only been applied in courts of equity in the absence of such exception where the statute related solely to actions at law. Hence, it is argued, where the statute contains no such exception, and expressly bars suits in equity, the rule is inadmissible.

If the premise of counsel is correct, their conclusion must be admitted. The correctness of their premise is the vital point of this case. The exact point has been carefully examined and determined by this court, and reexamined and reaffirmed more than once.

In *Bailey* v. *Glover*, 21 Wall. 342, an assignee in bankruptcy sued in equity to recover property alleged to have been fraudulently conveyed to the defendants by the bankrupt prior to the appointment of the assignee, which was more than three years prior to the suit. To avoid the bar of two years prescribed by the second section of the bankrupt act of 1867, it was alleged that the fraudulent acts of the bankrupt and the defendants were kept secret and concealed from the creditors and the assignee and were not discovered until within two years before the filing of the bill. Section 2 of the bankrupt act of March 2, 1867, after providing for suits in the Federal courts by and against assignees in bankruptcy in reference to the bankrupt estate, declared (14 Stat. 518):

> but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

The Circuit Court sustained a demurrer to the bill on the ground that the suit was barred because not brought within the prescribed two years, and the assignee appealed to this court. The question was thus squarely presented whether a statute of limitations enacted by Congress, expressly applicable to suits in equity as well as at law, as explicit and inflexible as words could make it, and containing no exception of cases involving concealed fraud, admitted nevertheless of such exception. As all limitation statutes apply to actions at law, and as the earlier ones applied in terms only to such actions, the answer to this question under the authorities obviously required an examination of the decided cases to ascertain whether this exception had been admitted in courts of law. The equity cases were first examined, and as to those it was said (p. 347):

> In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.[1]

[1] Citing in the margin: *Booth* v. *Lord Warrington*, 4 Brown's Parliamentary Cases, 163; *South Sea Company* v. *Wymondsell*, 3 Peere Williams, 143; *Hovenden* v. *Lord Annesley*, 2 Schoales & Lefroy, 634; *Stearns* v. *Page*, 7 Howard, 819; *Moore* v. *Greene*, 19 id., 69; *Sherwood* v. *Sutton*, 5 Mason, 143; *Snodgrass* v. *Bank at Decatur*, 25 Alabama, 161.

It was admitted by counsel in that case, as it is admitted here, that this is the established doctrine of courts of equity; but it was contended there, as here, that this doctrine resulted from the fact that the ordinary limitation statute is not considered as binding in courts of equity, that in courts of law where the statute is always binding this doctrine does not obtain, and hence that the equitable doctrine can not be applied to a statute imperative in its terms and expressly binding on courts of equity. Upon an examination of the decisions on this point the court said (p. 348):

> On the question as it arises in actions at law there is in this country a very decided conflict of authority. Many of the courts hold that the rule is sustained in courts of equity only on the ground that these courts are not bound by the mere force of the statute as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles.[1]

It should be observed that the cases cited by the court to this proposition are from the courts of New York, Virginia, South Carolina, and Tennessee. It is this class of cases upon which counsel for the appellants here rely, though none of these leading ones cited by the court is cited in their brief. If the

[1] Citing in the margin: *Troup* v. *Smith*, 20 Johnson, 33; *Callis* v. *Waddy*, 2 Munford, 511; *Miles* v. *Berry*, 1 Hill (South Carolina), 296; *York* v. *Bright*, 4 Humphreys, 312.

authority of these cases had been accepted in *Bailey* v. *Glover* the result would have been different, for it must then have been the accepted doctrine of this court that no exception on the ground of concealed fraud should be made by any court to which the general terms of a limitation statute expressly apply. But the court refused to follow these cases and accepted the authority of those to the contrary. Said the court (p. 348):

> On the other hand, the English courts and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law.[1]

The English cases, particularly the early ones, are of the first importance, because it was in England that the exception in question originated in the application of the first limitation statute, passed in 1623, and in terms applicable only to actions at law. All of those cases were found by the court in *Bailey* v. *Glover* to recognize the exception in such actions. Thereupon, the court announced its conclusions as follows (pp. 348–350):

> As the case before us is a suit in equity, and as the bill contains a distinct allegation

[1] Citing in the margin: *Bree* v. *Holbech*, Douglas, 655; *Clark* v. *Hougham*, 3 Dowling & Ryland, 322; *Granger* v. *George*, 5 Barnewall & Cresswell, 149; *Turnpike Co.* v. *Field*, 3 Massachusetts, 201; *Welles* v. *Fish*, 3 Pickering, 75; *Jones* v. *Conoway*, 4 Yeates, 109; *Rush* v. *Barr*, 1 Watts, 110; *Pennock* v. *Freeman*, Ib. 401; *Mitchell* v. *Thompson*, 1 McLean, 96; *Carr* v. *Hilton*, 1 Curtis, 230.

that the defendants kept secret and concealed from the parties interested the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity but for the peculiar language of the statute we are considering. We can not say in regard to this act of limitations that courts of equity are not bound by its terms, for its very words are that "no suit *at law or in equity* shall in any case be maintained . . . unless brought within two years," etc. It is quite clear that this statute must be held to apply equally by its own force to courts of equity and to courts of law, and if there be an exception to the universality of its language it must be one which applies under the same state of facts to suits at law as well as to suits in equity.

But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute

of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.

While we might follow the construction of the State courts in this matter, where those statutes governed the case, in construing *this* statute of limitation passed by the Congress of the United States as part of the law of bankruptcy, we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

The decision in *Bailey* v. *Glover* has never been doubted or qualified, but often examined and followed in this court. *Gifford* v. *Helms*, 98 U. S. 248, 252; *Upton* v. *McLaughlin*, 105 U. S. 640, 642; *Rosenthal* v. *Walker*, 111 U. S. 185, 190; *Traer* v. *Clews*, 115 U. S. 528, 537; *Kirby* v. *Lake Shore., etc., Railroad*, 120 U. S. 130, 136; *Avery* v. *Cleary*, 132 U. S. 604, 609; *Pearsall* v. *Smith*, 149 U. S. 231, 236; *Kinder* v. *Scharff*, 231 U. S. 517, 521.

The rule of *Bailey* v. *Glover* has been applied to the statute now under consideration, upon facts similar to those of the case at bar, in the Federal

courts of the ninth circuit. *Linn & Lane Timber Co.* v. *United States* (C. C. A.), 196 Fed. 593, 203 Fed. 394, affirmed on another point, 236 U. S. 574; *United States* v. *Puget Sound &c. Co.* (D. C., Washington), 215 Fed. 436; *United States* v. *Southern Pac. Co.* (D. C., S. D. Cal.), 225 Fed. 197, 201; *United States* v. *Booth-Kelly Lbr.* Co. (D. C., Oregon), 246 Fed. 970.

See also *State* v. *Stone Cattle Co.*, 66 Texas, 363, where the rule of *Bailey* v. *Glover* was applied to a similar statute upon a like state of facts.

The English cases.

Realizing the importance of the early English cases, because this rule of exception originated in England long prior to American independence, counsel for appellants advance as their foremost proposition, to avoid the rule of *Bailey* v. *Glover*, the following (brief, p. 45):

> The English cases are predicated upon the fact that statute 21 James I, applied solely to actions at law, and therefore the chancery courts might ingraft exceptions in equity cases.

This assertion challenges the foundation of *Bailey* v. *Glover*, in which the English cases were examined and found not to "make concealed fraud an exception on purely equitable principles," but to "hold that the doctrine is equally applicable to cases at law." 21 Wall. 348. If the mere assertion of counsel, contrary to the deliberate judgment of this court, were sufficient to induce a reexamination of the old English cases, it would not be necessary, for it was

done at an early date exhaustively and conclusively by a master hand.

In 1828 Mr. Justice Story decided the case of *Sherwood* v. *Sutton*, 5 Mason, 143. It was an action at law in the Circuit Court for the District of New Hampshire, founded upon a deceitful representation in a sale, brought more than six years after the transaction. The State statute of limitations required that all personal actions of this nature should be commenced "within six years next after the cause of such actions or suits, and not after." The defendant pleaded this statute in bar. The plaintiff replied that there was a fraudulent concealment of the deceit until within six years before the action. The jury found for the plaintiff, and upon a point reserved, the single question was as to the sufficiency of the replication to avoid the plea of the statute. This question depended primarily upon the doctrine of the English cases, for, as it was said (p. 144):

> The statute of limitations of New Hampshire, of 16th June, 1791 (New Hampshire Laws, p. 164), is, in substance, a transcript of the statute of 21 Jac. 1, ch. 16, so far as it respects personal actions of this nature; and it contains like exceptions in favour of infants, femmes covert, &c. It contains no special exception, however, as to actions founded on fraud, where the fraud has been concealed during the period of the common limitation; and therefore, the legal propriety of creating such an exception must depend upon the same principles here, as it would depend upon in the courts of Westminster Hall.

The first point determined upon the authorities was that the statute was binding on courts of equity, in cases of legal titles and demands, though it did not in terms embrace suits in equity. With reference to such cases, it was said to be "emphatically true that courts of equity do not act merely by *analogy* to the statutes, but in *obedience* to them" [1] (pp. 145–146). It was then observed that "there are many cases where courts of equity act, in the application of the statute of limitations, by way of *analogy* only, as when they apply it to merely equitable rights and titles not at all cognizable at law" [2] (p. 146). It was conceded that the decisions in such cases are not always a safe guide for courts of law, but that "it can scarcely be said that the decision in cases of concurrent jurisdiction, in which they profess to act in *obedience* to the law, ought not to be of great authority, as just expositions of the true intent of the statute."

These decisions were accordingly examined and found to recognize the exception of concealed fraud "upon grounds common to courts of law and equity" [3]

[1] Citing *Hovenden* v. *Lord Annesley*, 2 Sch. & Lefr. 607, 630; approved in *Bailey* v. *Glover*, 21 Wall. 348.

[2] Citing, among other cases, *Bond* v. *Hopkins*, 1 Sch. & Lefr. 413, 428, and *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 110; relied on by the appellants in the case at bar, brief, pp. 45, 46.

[3] Citing *Booth* v. *Lord Warrington*, 4 Bro. Parl. Cas. 163; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lefr. 607, 634; *Western* v. *Cartwright*, Select Cases in Ch., 34, 2 Eq. Abridg. 10, pl. 11; *South Sea Co.* v. *Wymondsell*, 3 P. Will. 143; *Deloraine* v. *Browne*, 3 Bro. Ch. 633; *Battley* v. *Faulkner*, 3 Barn. & Ald. 288.

(p. 147). The inference deduced from them was that (p. 148)—

> the construction adopted by these courts, that the concealment of the fraud avoids the bar of the statute of limitations, is founded in solid sense, and is a natural limitation upon the language of the statute.

The next step was to inquire how the case had been treated at law. With this the learned justice premised his discussion of the English cases at law in language that ought to be put in juxtaposition with the assertion of counsel for appellants in the case at bar, viz (pp. 148–149):

> Now the first remark that suggests itself is, that there is not to be found a single case in England, during the period of two centuries since the enactment of the statute, in which a court of law has been found to deny the application of the doctrine to suits at law; and more than a century ago, the very question was put, by the House of Lords, to all the judges, and no trace can be found of any adverse opinion given by them.

On the other hand, several of the leading cases at law which established the doctrine for those courts in England were cited and discussed at length.[1]

[1] *Bree* v. *Holbeck*, Doug. 655; *Clark* v. *Hougham*, 2 Barn. & Cress. 149, 3 Dowl. & Ry. 322; *Granger* v. *George*, 5 Barn. & Cress. 149. These cases were all cited with approval in *Bailey* v. *Glover*, 21 Wall. 348. There is a remark to the contrary effect, apparently made upon slight consideration of the authorities, in *Amy* v. *Watertown*, *No. 2*, 130 U. S. 320, 324. The rule of *Bailey* v. *Glover* was not questioned, however, nor was that case cited.

Finally the American cases were considered. These were found to be all one way and in conformity to the English doctrine,[1] with but one exception, a New York case, and this was analyzed and shown to be not well founded.[2]

Upon concluding this exhaustive discussion of the authorities, the underlying principle of the settled English and prevailing American doctrine was considered and stated, as follows (p. 154):

> What, then, is the reason upon which this exception has been established? It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and

[1] *Jones* v. *Conoway*, 4 Yeates, 109; *First Mass. Turnpike Corp.* v. *Field*, 3 Mass. 201; *Homer* v. *Fish*, 1 Pick. 435; *Welles* v. *Fish*, 3 Pick. 74; *Bishop* v. *Little*, 3 Greenleaf, 405. These cases were cited with approval, along with *Sherwood* v. *Sutton*, in *Bailey* v. *Glover*, 21 Wall. 348.

[2] *Troup* v. *Smith*, 20 Johns. 33. This is the very strongest case in favor of the appellants' position in the case at bar to be found in the books, but it is not cited by counsel. It was conspicuously disapproved in *Bailey* v. *Glover*, 21 Wall 348.

> equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason on which the exception is built, and not merely that there is an equity binding upon the conscience of the party, which the statute does not reach or control. Nor is this mode of interpretation of statutes new in courts of law.

After citing numerous examples of such interpretation from the decisions, the learned justice concluded (p. 155):

> Now, if any exception out of the words of the statute is to be created by implication, I can scarcely conceive of one which stands upon better reason than that now insisted on; for it is in furtherance and not in evasion of the legislative intention. It is material to state that the point is not whether mere ignorance of the fact on the part of the plaintiff ought to remove the bar; but whether this ignorance resulting from the fraudulent concealment of the fact by the defendant ought to have that effect. It was said at the bar that the reasoning of Mr. Chief Justice Parsons in 3 Mass. R. 201 is not characterized by his usual ability and strength. But it seems to me that it meets the objection in the only manner in which it can be met; that is, by affirming that the court would violate a sound rule of law if it permitted the defendant to avail himself of his own fraud. That is not denied by Mr. Chief Justice Spencer [in *Troup* v. *Smith*, 20 Johns. 33], who puts his opposition to the doctrine upon the words of the statute and

> the inability of a court of law to dispense with its obligation or to create exceptions. It may be fairly presumed that the fact that in New York cases of this sort were remediable in chancery had some influence in inducing him to adhere to the letter of the statute. For myself, I must say that in a case of concurrent jurisdiction, if remediable in equity, it ought to be so at law, for the same reason applies to both courts.

A full discussion of the early English and American cases leading to the same result is found in Angell on Limitations, 6th ed., secs. 183–186, which was written prior to the decision in *Bailey* v. *Glover*.

See also *Bank* v. *Fairbank*, 49 N. H. 131, 141; *Way* v. *Cutting*, 20 N. H. 187, 190–194; *Bowman* v. *Sanborn*, 18 N. H. 205, 208.

Counsel quote the language of Vice-Chancellor Malins in *Ecclesiastical Commissioners* v. *North Eastern Ry. Co.*, L. R. 4 Ch. Div. 845, 859, that "before the 3 & 4 Will. 4, c. 27, the statute of limitations was not binding in courts of equity."

This remark is true, if at all, only with respect to such equitable claims and titles as were not also cognizable in courts of law. With respect to legal titles and demands, as to which courts of equity acted concurrently with courts of law, the statute of 21 James I, passed in 1623, was always considered just as much pleadable as a bar in equity as at law. See *Sherwood* v. *Sutton*, 5 Mason, 143, 146, and cases cited. The pertinency of Vice-Chancellor Malins'

remark in the case before him is not apparent. The statute of 3 & 4 Will. 4, c. 27, § 24, *et seq.*, 73 Stat. at L. of England, 140, 146, passed in 1833, did no more in reference to the point in question than to adopt certain rules already established by the courts. An examination of the case itself shows that the decision was not in any wise founded upon the language of the later statute, but upon the previously established rule of exception in cases of concealed fraud. Though the result was right, the reasoning by which it was reached was not cogent.

All this was very clearly shown in a case decided twenty years later by the Privy Council, in which the same result was reached upon a similar state of facts, but in which the reasoning of Vice-Chancellor Malins in the case of the *North Eastern Ry. Co.* was disapproved. *Bulli Coal Mining Co.* v. *Osborne* [1899], A. C. 351, 362.

Cases of inflexible language.

Because the statute in *Bailey* v. *Glover* fixed the period of limitation at two years "from the time when the cause of action accrued," counsel for the appellants assume that the decision was founded upon an interpretation of those particular words. This is a mere grasping at straws. There is nothing in the opinion to indicate that a period running from the time the cause of action accrued was considered any less definite or more susceptible of interpretation than one running from the date of a designated trans-

action. On the contrary, the court very plainly regarded the statute as precisely like those dealt with in the cases which it cited. The English statute of 21 James I, ch. 16,[1] in the application of which the rule originated, concededly did not employ such language, and "it is to be remembered," as Mr. Justice Story said in *Sherwood* v. *Sutton*, 5 Mason, 143, 153, "that most if not all the statutes of limitations existing [in 1828] in the several States of this Union have borrowed the language of the statute of 21 of James." It was upon the authorities applying the rule to those statutes that the court relied in *Bailey* v. *Glover*.

Counsel cite *Kirby* v. *Lake Shore Railroad*, 120 U. S. 130, as "the first opinion of this court wherein the reason for the principle was stated." They say that *Bailey* v. *Glover* "applied the rule without expressing its basis," but that "the *Kirby* case removed all doubt upon the subject." If any doubt such as that entertained by counsel as to the basis of the rule of *Bailey* v. *Glover* could exist after reading the opinion, it would indeed be dispelled by the *Kirby* case. In that case the basis for the rule is stated by quoting it from the opinion in *Bailey* v. *Glover*, and it is then clearly shown that the statute there involved was understood as definitely fixing the limitation period. Said the court in the *Kirby* case, 120 U. S. 130, 137:

> In the same case [*Bailey* v. *Glover*] it was said: "To hold that by concealing a fraud, or

[1] Printed in the appendix.

by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure." See, also, *Traer* v. *Clews*, 115 U. S. 528, 538. These observations were made with reference to an act of Congress prescribing *a fixed time* within which a suit between an assignee in bankruptcy and persons asserting adverse rights in property conveyed to such assignee should be brought.

The same view of *Bailey* v. *Glover* was well expressed in *Greenwald* v. *Appell*, 17 Fed. 140, 141, as follows:

That is a case which arose under the bankrupt act of 1867, which has a limitation clause embodied in its second section. That clause provides that no suit at law or in equity shall in any case be maintained, etc., "unless the same shall be brought within two years from the time the cause of action accrued." *That is as broad, as sweeping, and comprehensive as any statute of limitations can be made.* It applies to suits both in law and in equity; it applies to all classes of suits, and declares that no suit shall be maintained unless it be brought within two years. The question arose whether, under that statute, courts would create an exception in the case of concealed fraud. In an elaborate opinion by Mr. Justice Miller, the supreme court laid down the rule that this was an exception,

notwithstanding the clear and comprehensive terms of the statute itself.

In *Linn & Lane Timber Co.* v. *United States* (C. C. A., 9th Circuit), 196 Fed. 593, 599, comparing the statute in *Bailey* v. *Glover* with the one here, the court said:

> In that case the statute of limitations was as absolute as that which is invoked in the present case.

In *United States* v. *Southern Pac. Co.*, 225 Fed. 197, 202, District Judge Bledsoe said upon the same point:

> The counsel for defendants seek to differentiate the ruling in *Bailey* v. *Glover* because of the fact that there the statute of limitations began to run "from the time the cause of action accrued," while in the acts of Congress in question herein the statutes began to run from the date of the issuance of patents by the Government. I can see nothing, however, in this suggestion of benefit to defendants. In the case at bar the cause of action as for the fraud alleged accrued—that is, arose—at the time of the issuance of the patent, in consequence of the fraudulent representations. Counsel advance the suggestion that:
>
> "It is not illogical and does no violence to the language of the statute involved in *Bailey* v. *Glover* to say that an action 'accrues' to a plaintiff when he discovers he has one."
>
> I can discover, however, no authority which supports this suggestion, and the use and defi-

> nition of the word "accrues," as found in the books, do not lend countenance to it. 25 Cyc. 997, 1066.

Counsel further say, referring to *Bailey* v. *Glover*, that "all National and State decisions which have followed it involved statutes prescribing that suits must be brought within a certain time after the cause of action accrues." This is a bold statement; but counsel have overlooked some decisions.

In *State* v. *Stone Cattle Co.*, 66 Texas, 363, a statute for the disposition of public land of the State prohibited the acquisition by one person or corporation of more than one section of a certain class of land in any one county, and provided that:

> Every attempt to evade the limitation of this act as to the amount or class of land one may purchase, by any device whatever, shall be deemed fraudulent, and the fraud may be shown and the purchase cancelled by the State *within one year from the date of sale.*

The State sued to cancel a number of sales in one county on the ground of fraud in that the defendant company had procured the individuals to whom the sales were made to purchase for its benefit in evasion of the statute. The suit was filed more than one year after the sales, and to avoid the bar it was shown that the fraud was concealed by keeping the titles in the names of the pretended purchasers, and that the fraud was not discovered until less than a year before the suit. It was contended, as it is here,

that the rule of concealed fraud applicable to ordinary statutes of limitation did not apply, because the limitation period was fixed at one year from the date of sale, instead of one year from the accrual of the cause of action, and that if any such qualification of the imperative language had been intended it would have been expressed, especially since it was apparent that the legislature had in mind cases of fraud. But this contention was rejected, and the rule of *Bailey* v. *Glover* was applied. The court said (p. 366):

> The suits authorized are required to be filed within twelve months from the date of sale. If any person or corporation purchases more land, or land of a quality other than provided in the act, the fraud is complete when the purchase is made, and the State's right of action accrues at the date of sale. No fraud can be committed under this law, which does not confer upon the State a right to sue coeval with the sale. *When, therefore, it is said that the suit shall be brought within one year from the date of sale, no more and no less is meant than if the provision were for suit within one year from the date of the accrual of the cause of action.*
>
> The peculiar phraseology of the clause is susceptible of the same interpretation as if the limitation had been expressed in the language generally used in statutes of limitation. The language that the fraud may be shown and the purchases cancelled by the state within one year from the date of sale may have been

used to convey the same idea as if the legislature had said that purchases in fraud of the act may be avoided by suit by the state to be commenced within twelve months from the date of the accrual of the cause of action.

As already stated, if the latter expression had been used, there would be no difficulty, for the qualification universally implied in laws prescribing a limitation of actions would be implied as a part of this act. Whether in departing from the established forms of expression it was the purpose of the legislature to escape the implications usual to such provisions, is the question. If such was the purpose, it could certainly have been more plainly indicated by an express negative than by merely coining new phrases. As it is, the new phrases are susceptible of the old construction, and, in view of the policy of the law, we believe that to be the proper construction. *It could scarcely have been intended that the fraudulent purchaser should reap a benefit from an aggravation of his offense by the fraudulent concealment for twelve months of the character of his purchase. The purpose was not to punish a want of shrewdness, but a want of honesty. It was not designed to cancel purchases fraudulently made, and allow those to escape fraudulently made, but in which also the fraud was fraudulently concealed.* It is contended by the defendant in error that as fraud is the very cause of action, and in the mind of the legislature, the qualification would have been expressed if it had been intended that

> fraudulent concealment would extend the period of limitation. The cases in which the period is postponed by concealment of the cause of action are generally those in which the cause of action itself is a fraud. Wood on Lim., sec. 276. The largest class of suits brought by assignees in bankruptcy are those arising from frauds upon the bankrupt act; yet the two years prescribed within which suits are to be brought by or against the assignee does not commence to run against the assignee asserting a right arising from a fraud upon the act, until the fraud, if concealed, is discovered. *Bailey* v. *Glover*, 21 Wall. 342. When it is considered that fraud in one or another form enters so frequently as an element in the various causes of action prescribed by law, it may be assumed to be in the mind of the legislature in the enactment of every statute of limitation, and perhaps the only reason why the qualification being considered is never expressed is that it is universally implied.

The decision in this case was approved and followed in *State* v. *Wichita Land & Cattle Co.*, 73 Texas, 450, and *Wichita Land & Cattle Co.* v. *State*, 80 Texas, 684.

In *Johnston* v. *Roe*, 1 Fed. 692, 694, the statute relied on as a bar was stated as follows:

> The statute of Missouri concerning administration requires the presentation of all claims against an estate within two years from the time of the publication of a notice of the

> administration to creditors, and it declares that "*all demands not thus exhibited within two years shall be forever barred.*" There is a saving clause in favor of infants, persons of unsound mind, persons imprisoned, and married women, but nothing is said as to cases of concealed fraud. 2 Wagner's St. 86, 102.

The suit was by a receiver of a bank against the heirs of a decedent estate, upon a claim not presented within the limitation period, and the suit was sustained because the fraud out of which the claim arose had been concealed.

Counsel for the defendants contended (p. 694):

> That the statute regulating the prosecution and collection of claims against an estate absolutely bars all demands not exhibited within two years, and that, since no exception is made by the statute itself in favor of demands growing out of concealed fraud, the court is not at liberty to engraft this exception upon the statute.

But the court rejected this contention and said (p. 696):

> The statute, thus construed, would be in direct conflict with a well-settled rule of equity jurisprudence as understood and administered in the Federal courts for many years. It would require this court to hold that, in a case where the demand happens to be against an estate, a party who has committed a fraud may consummate it beyond the possibility of remedy by concealing it. . . .

> The rule that the statute of limitations does not run in favor of one who perpetrates a fraud while he conceals it from the party injured, as a general doctrine of equity jurisprudence, is too well settled to require the citation of authorities.

In *Eddy* v. *Eddy* (C. C. A., 6th Circuit), 168 Fed. 590, a statute of Michigan was involved, which provided that the right of a widow to elect to take otherwise than under the will of her deceased husband "shall be made in writing, and filed in the court in which proceedings for the settlement of the estate are being taken, *within one year from the probate of the will;* and the failure to file such election within the time above provided shall be deemed an election to take under the will." The plaintiff sued after the time limited to establish her statutory rights in her deceased husband's estate, alleging that she had been prevented from making her election within the time by a fraudulent concealment of the true situation on the part of the executor. The suit was sustained and the court said (p. 599):

> But is the proposition sound that, whatever the conditions, whether brought about in due course of things, or by the wrongful devices of the party profiting by their success, the right to election is gone with the lapsing of the year, and no court has the power to relieve the injured party from the consequences? To say this is to give to the other party the fruits of their own misconduct, a result which must be always abhorrent to a court of equity.

In 19 Am. & Eng. Encl. of Law (2d ed.), 243, it is said:

"It has always been the rule in equity that the defendant's fraudulent concealment of a cause of action will postpone the running of the statute until such time as the plaintiff discovers the fraud; the defendant, having by his own wrongdoing prevented the plaintiff from instituting his suit, will not be permitted to take advantage of his own wrong by setting up the statute as a defense."

And, as we shall see, in several of the cases cited, the rule has been applied not only to statutes of limitation prescribing the time within which actions shall be brought, but to other cases where the neglect of the party would have precluded him from a valuable right. *Bailey* v. *Glover*, 21 Wall. 342; 22 L. Ed. 636.

Graffam v. *Burgess*, 117 U. S. 180; 6 Sup. Ct. 686; 29 L. Ed. 839, was a case where the plaintiff had neglected to redeem within the year prescribed by the statute; and she was relieved from the consequences. Several of the justices dissented, but that was upon the view which they took of the facts. They said:

"In our opinion there is no evidence of such misconduct on his part as afforded any ground, in law or equity, to justify appellee in her failure to redeem from the sale."

This was said by the same justice (Miller) who delivered the opinion in *Bailey* v. *Glover*.

In *Bank* v. *Fairbank*, 49 N. H. 131, decided prior to *Bailey* v. *Glover*, the statute in reference to the settlement of insolvent estates fixed a definite time

from the date of the commission of insolvency for the presentation of claims, extendible for good cause to not more than two years, and provided that—

> all demands against any estate which might be presented to the commissioners, and were not so presented; and all demands so presented and rejected, and not allowed upon appeal as aforesaid, shall be forever barred.

The plaintiff, who had not presented his claim within the time limited, sued to subject a surplus in the hands of the administrator to his claim, on the ground that he had been prevented from presenting his claim by the fraudulent practices of the intestate whereby the claim was concealed. The court said (p. 141):

> By the general statute of limitations, actions of trespass to the person, and actions for defamatory words, are to be brought within two years, and all other personal actions within six years, *after the cause of action occurred*, and not afterward. General Statutes, ch. 202, sec. 3, and the Revised Statutes was much the same; and yet, although this limitation is explicit and includes all personal actions, it is well settled that it does not take effect when the debt is fraudulently concealed by the debtor, and this is the doctrine both at law and equity; although it doubtless had its origin in equity, upon the ground that it was against conscience, that a debtor should set up the bar of the statute under such circumstances and thus take advantage of his own fraud. The cases which establish this doctrine here

are *Bowman* v. *Sanborn*, 18 N. H. 205; *Way* v. *Cutting*, 20 N. H. 187; *Douglass* v. *Elkins*, 28 N. H. 26, 32. To permit a debtor thus to take advantage of his own wrong, would be so repugnant to every principle of natural justice, that it may well be presumed that it was not contemplated by the lawmakers in framing this statute. To allow it, would be converting the statute into an instrument of fraud and injustice, and it would require strong language to justify such a construction.

The terms of the statute, limiting suits against executors and administrators, are no more explicit or absolute than those of the general statute of limitations; and taking both provisions of the former into consideration, there is strong reason to presume that the legislature contemplated some exceptions to the general rule. Nor do we perceive any such difference, in the character of the two subjects, as to afford reason to regard the limitation of suits against executors and administrators to be absolute, and not subject to the established principle of equity, which precludes a party from taking advantage of his own wrong. Both are statutes of repose; and if the purpose had been to make the prohibition of suits against executors and administrators absolute, even in cases of fraud, it would be natural to expect a distinct expression of that purpose, instead of using terms so like those of the general statute of limitations, as to lead to the inference that a similar qualification was contemplated.

In *Newberry* v. *Wilkinson* (C. C. A., 9th Circuit), 199 Fed. 673, 682–686, the rule of *Bailey* v. *Glover* was applied to two statutes of the State of Washington. One provided, with reference to the presentation of claims against estates of decedents, that:

> If a claim be not presented within one year after the first publication of the notice, it shall be barred.

And the other, with respect to administration bonds, provided that:

> All actions against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal.

The effect of these cases is to make certain, what is quite apparent without them, that the phrase "after the date of the patent" means specifically, with respect to a particular kind of transaction, what the phrase "after the cause of action accrued" means generically with reference to various kinds of transactions.

Adoption of the rule by statute.

The fact that the rule of *Bailey* v. *Glover* has been very generally adopted by statute in the various States, so far from fortifying the position of counsel, proves only the solid sense and natural justice of the rule. The effect of those statutes is practically to overrule the decisions which were disapproved in *Bailey* v. *Glover* and to make the rule of that case universal in its application. If there were in exist-

ence a single statute repealing it in those jurisdictions where it otherwise prevails, that would tend to support the counsel's position. There might then be some ground for the contention in a particular case that its repeal was intended. But never having been expressly repealed anywhere, its repeal is not lightly to be implied. *State* v. *Stone Cattle Co.*, 66 Texas, 363, 367; *Bank* v. *Fairbank*, 49 N. H. 131, 141.

Cases distinguished.

Counsel rely upon *Pickett* v. *McGavick*, 19 Fed. Cas. 588; *In re Brown*, 4 Fed. Cas. 338; *Matter of Herzig*, 15 Abbott's N. C. 179, and *Mall* v. *Ullrich*, 37 Fed. 653, which distinguish section 34 of the Bankruptcy Act of 1867 from section 2 of that act which was involved in *Bailey* v. *Glover*. Section 34 reads as follows (14 Stat. 533):

> That a discharge duly granted under this act, shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in *haec verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge: *Always provided*, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in

bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of siad discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

In the cases cited it was held that a discharge in bankruptcy could not be set aside upon application made more than two years thereafter, though the fraud upon which it was obtained was concealed until within two years. It is said that the reason why the rule of *Bailey* v. *Glover* was not applied was because the time fixed in section 34 for applying to set aside a discharge was fixed at "two years after the date thereof," whereas the time fixed in section 2 for bringing suits by or against the assignee was "two years from the time the cause of action accrued" for or against such assignee. There is ground for this in some of the language used in the cases cited; but it is not the true distinction. The distinction is that section 34 is not a limitation of the right to sue upon a cause of action otherwise existing, but a limitation of the power and jurisdiction of the court to set aside its judgment after a specified time. In one of the cases, *Matter of Hertzig*, 15 Abbott's N. C. 179, Judge Brown said:

> In my judgment, the time specified is a limitation upon the authority of the court; and such an application can not be entertained after two years has expired.

And with reference to the other three cases the Court of Appeals said in the case at bar on the first appeal (203 Fed. 392):

> Such statute stands in the same position as statutes relating to the time in which appeals may be taken.

If this is not the true distinction, then there is none, and the rule of *Bailey* v. *Glover* properly applies to section 34 as well as section 2 of the bank-

ruptcy act. In *Nicholas* v. *Murray*, 5 Sawyer 320, 324, Judge Deady expressed his inclination to the view that the rule applied to section 34, though the precise point was not involved. And in *Perkins* v. *Gay*, 19 Fed. Cas. 589, note, Judge Taft adopted that view, the commentators being found by him in disagreement.

Lane v. *Hoglund*, 244 U. S. 174, is cited for the appellants. In that case a writ of mandamus was awarded compelling the issuance of a homestead patent under section 7 of the act of March 3, 1891, 26 Stat. 1095, 1099, which provides:

> That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

The case turned upon the question whether an adverse report of a forestry official made but not acted upon within two years after issuance of the receiver's final receipt, constituted a pending "protest against the validity of such entry," and the court held that it did not. There was no charge of fraud nor suggestion of concealment of a cause of action. Certainly the court had no thought of holding that this statute was a condonation of fraud prior to the patent, or that even after issuance of the patent it could not be annulled for fraud subsequently discovered, as, for example, a discovery that

the entry had been made for the benefit of some person other than the entryman pursuant to a prior agreement.

No question of fraud was involved or considered in *United States* v. *Winona & c. Railroad*, 165 U. S. 463; *United States* v. *Chandler Dunbar Co.*, 209 U. S. 447; or *Louisiana* v. *Garfield*, 211 U. S. 70. The passing remark of Mr. Justice Brewer in the *Winona case* about the statute operating as a transfer of title even in cases of fraud, had no reference to a case where the statute is sought to be used as an instrument of fraud by a fraudulent concealment of the cause of action. And Mr. Justice Holmes will no doubt be again astonished to learn that his language in the other two cases can be regarded as susceptible of use to condone a fraud. A recent similar attempt in that direction met with scant consideration. See *United States* v. *Whited & Wheless*, decided April 15, 1918.

Legislative history.

Counsel for the appellants have printed in a separate appendix the committee reports and debates of Congress on the Limitation Act of 1896, five years after the act we are considering, in order to show, what we readily admit, that the Limitation Act of 1891 embraced patents procured by fraud. The industry of counsel has this value, however: It enables us to rest secure in the assumption that if there had been a word reported to or written by the committee or spoken on the floor of Congress tending to show an intention to bar a cause of action like this, counsel would have pointed it out. Instead of that

all that is shown is an occasional passing statement tending to show that patents procured by fraud were not wholly out of mind.

It is worthy of note, however, that the act of 1896 concerned only patents "erroneously issued" under railroad and wagon road grants, and that the committee report which accompanied that act shows that the act of 1891 grew out of the confusion resulting from the administration of railroad grants. House Report 253, Fifty-fourth Congress, first session; *United States* v. *Whited & Wheless*, decided April 15, 1918. In this situation, while instances of fraudulent conduct "might exist, yet," as it was said in the *Winona case*, 165 U. S. 478, "in the nature of things they would be few and hardly worth the special notice of Congress." So it was that when Mr. Hepburn offered an amendment calculated to permit suits to be brought only in cases of fraud, Mr. Lacey, in charge of the bill, remarked: "If the amendment be adopted, we may as well kill the bill. There would not be enough left to swear by, although there might be enough to swear at." Appendix to Brief of Appellants, p. 83.

But even if it appeared that Congress intended to deal specifically with cases of fraud in the acquisition of coal lands by the use of dummy entrymen, yet, as the Supreme Court of Texas said in such a case, *State* v. *Stone Cattle Co.*, 66 Texas, 363, 367:

> It could scarcely have been intended that the fraudulent purchaser should reap a benefit from an aggravation of his offense by the fraudulent concealment.

And again (p. 367):

> When it is considered that fraud in one or another form enters so frequently as an element in the various causes of action prescribed by law, it may be assumed to be in the mind of the legislature in the enactment of every statute of limitation, and perhaps the only reason why the qualification being considered is never expressed is that it is universally implied.

The rule applied in favor of the Government.

The fact that this statute of limitation runs against the Government is no reason why it should not be subject to the same exception as one running only against individuals. Indeed the greater liability of the Government to fraudulent imposition is all the more reason why it should have the benefit of this "universally implied" qualification of the broad language of the statute. The right of the Government to relief against fraud is certainly not less than that of the individual. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279. In cases of fraudulent practices in the acquisition of public lands, it is entitled to "all the remedy which the courts can give." *United States* v. *Minor*, 114 U. S. 233, 241. And it is a fundamental rule of interpretation, founded on "a great principle of public policy" that the "United States, asserting rights vested in them as a sovereign Government are not bound by any statute of limitations unless Congress has clearly manifested its intention that they should

be so bound." *United States* v. *Whited & Wheless*, decided April 15, 1918.

But counsel ask: "Who is 'the United States' when it comes to the question of acquiring knowledge of a fraud?" We answer the question with another: Who is any corporation for the same purpose? Certain officers of the Government are charged with prescribed duties, just as are the officers of any large corporation, and equally in the one case as in the other knowledge or means of knowledge on the part of the agent in the line of his duty would be imputed to his principal. The question, "who is the State?" was not asked in *State* v. *Stone Cattle Co.*, 66 Tex. 363, but if it had been no difficulty would have been presented. No such difficulty seems ever to have occurred to the legislatures of the various States which have adopted statutes of limitation running against the State with the express provision that in cases of fraud the limitation period shall not begin until the fraud is discovered, nor have we found any such difficulty suggested in the decisions applying the rule of diligence against a State. See *People* v. *Blankenship*, 52 Cal. 619; *State* v. *Giles*, 52 Ind. 356; *State* v. *Furlong*, 60 Miss. 839; *State* v. *Warner Valley Stock Co.*, 56 Oreg. 283, 304.; *State* v. *Wichita Land and Cattle Co.*, 73 Texas, 450.

Concealment of the Fraud.

It is contended that this case is not within the rule of concealed fraud because no affirmative acts of concealment subsequent to the patents were shown. Quoting from *Wood* v. *Carpenter*, 101 U. S. 135, 143, it is said: "Concealment by mere silence is not

enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." In this case such trick or contrivance is flagrant.

The Exploration Company, a foreign corporation, and therefore disqualified from acquiring public coal lands of the United States, conceived the scheme of employing secret agents in this country to procure the purchases to be made for its benefit by dummies, and thereafter of holding the titles in the name of a secret trustee. So well was the fraud planned that neither the dummy entrymen, nor the men who employed them at $25 a head, had any knowledge of the fact that they were acting for the benefit of the Exploration Company.

All of the entrymen dealt with Henry Burrell, or with John Davis or Millard Fairlamb, persons employed by him for the purpose (Cartwright, R. 57; Baldwin, R. 57–58; Hensler, R. 58; Wigram, Emma F. Nutter, R. 59; Anna Nutter, R. 60; Gilbert, Charles P. Nutter, R. 61; Remington, R. 62; Elliott, Stella M. Fairlamb, R. 63; Emma A. Fairlamb, R. 64; S. L. Fairlamb, R. 65). Millard Fairlamb testified to his employment by Henry Burrell, and further: "Mr. Burrell did not tell me whether he represented any other persons than himself in the transactions relating to the coal lands. I understood Mr. Burrell was there on his own behalf" (R. 67). Alexander Burrell, to whom the titles were all conveyed after patent, testified that, according to his understanding, his brother Henry acquired the lands as a personal investment for himself and certain individual associates, and that "neither the Explora-

tion Company nor any other corporation had any interest in the matter." The connection he had was "to receive the title and later to transfer the same to Mr. Smith" (R. 86.) Smith, who conveyed to Foster, didn't know how the titles came to be put in his name. He paid no consideration and received none. He conveyed to Foster at the request of Molson, a representative of the Exploration Company, and until this request was made he didn't know the titles were in his name (R. 80).

The recording of deeds such as these were of themselves affirmative acts of concealment of the fraud after the patents. The most diligent inquiry of Burrell or Smith would have elicited nothing concerning the interest of the Exploration Company, and the Government had a right to rely on the affidavits of the original purchasers (R. 46) showing their good faith. *United States* v. *Minor*, 114 U. S. 233, 240.

But apart from the consideration of subsequent affirmative acts of concealment, the trick or contrivance for concealment inhered in the original fraud from its inception. Silence is enough where the fraud is committed "in a manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it." *Bailey* v. *Glover*, 21 Wall. 342, 349.

The reason of this self-evident proposition was illuminated by Lord James of Hereford, speaking for the court in *Bulli Coal Mining Co.* v. *Osborne* [1899] A. C. 351, 363, with the following example:

> The contention on behalf of the appellants that the statute is a bar unless the wrong-

> doer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing," and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote.

As the Supreme Court of Texas tersely said, referring to the rule of concealed fraud, in *State* v. *Stone Cattle Co.*, 66 Texas, 363, 367:

> The purpose was not to punish a want of shrewdness, but a want of honesty.

See also *Carr* v. *Hilton*, 1 Curtis, 230, 238; *McAlpin* v. *Hedges*, 21 Fed. 689, 690, and cases cited.

Conclusion.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

FRANCIS J. KEARFUL,
Assistant Attorney General.

APRIL, 1918.

APPENDIX.

[7 Stat. at L. of England, 273.]

1623. Anno vicesimo primo Jacobi, C. 16.

CAP. xvi. An act for limitation of actions, and for avoiding of suits in law.

For quieting of men's estates, and avoiding of suits, be it enacted by the King's most excellent majesty, the lords spiritual and temporal, and commons, in this present parliament assembled, That all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of or for any manors, lands, tenements or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken *within twenty years next after the end of this present session of parliament:* and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements or hereditaments; (2) and that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken *within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years;* (3) and that no person or persons that now

hath any right or title of entry into any manors, lands, tenements or hereditaments now held from him or them, shall thereinto enter, but *within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued;* (4) and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but *within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same;* and in default thereof, such persons so not entring, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or statute to the contrary notwithstanding.

II. Provided nevertheless, That if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be *at the time of the said right or title first descended, accrued, come or fallen,* within the age of one and twenty years, femme covert, non compos mentis, imprisoned or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; (2) so as such person and persons, or his or their heir or heirs, shall *within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.*

III. And be it further enacted, That all actions of trespass quare clausum fregit, all actions of trespass, detinue, action for trover, and replevin for taking away of goods and cattle, all actions of account, and

upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) (2) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass quare clausum fregit, *within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after;* (3) and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, *within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after;* (4) and the said actions upon the case for words, *within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after.*

IV. And nevertheless be it enacted, That if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed and shall after reverse the outlawry; that in all such

cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, *within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.*

V. And be it further enacted, That in all actions of trespass quare clausum fregit, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea, to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; (2) and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suit concerning the same.

VI. And be it further enacted by the authority aforesaid, That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any the courts of record at Westminster, or in any courts whatsoever that hath power to hold plea of the same, after the end of this present session of parliament, if the jury upon the trial of the issue in such action, or the jury that shall enquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without

any further increase of the same; any law, statute, custom, or usage to the contrary in any wise notwithstanding.

VII. Provided, nevertheless, and be it further enacted, That if any person or persons that is or shall be entituled to any such action of trespass, detinue, action for trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be *at the time of any such cause of action given or accrued, fallen or come,* within the age of twenty-one years, femme covert, non compos mentis, imprisoned or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.

[The italics are supplied.]

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EXPLORATION COMPANY, LIMITED, ET AL. v. UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 277. Argued May 1, 1918.—Decided June 10, 1918.

Statutes of limitation upon suits to set aside fraudulent transactions do not begin to run until discovery of the fraud. *Bailey* v. *Glover*, 21 Wall. 342.

This rule applies to the provision of the Act of March 3, 1891, 26 Stat. 1093, that suits to vacate land patents shall only be brought within six years after the dates of the issuance of the patents.

235 Fed. Rep. 110, affirmed.

THIS suit was brought in the United States District Court for the District of Colorado to cancel nine coal land patents embracing 1120 acres of land in Colorado which, it was charged, had been procured from the United States by fraud. A further purpose of the suit was to cancel deeds of the same land from various persons to one Philip L. Foster alleged to be in secret trust for the Exploration Company, a foreign corporation, for whose benefit it is alleged the frauds were committed. Six of the patents were of date of October 16, 1902, and three of date of September 6, 1902. The suit was brought March 3, 1911, about eight and a half years after the dates of the patents, the bill alleging that the fraud by which the patents were obtained was self-concealing in its nature, was concealed from the Government by the wrongdoers and was not discovered until 1909. The defendants demurred on the ground that the suit was barred by the statute of limitations, and the demurrer was sustained by the District Court. 190 Fed. Rep. 405. The Circuit Court of Appeals for the Eighth Circuit reversed this decision, and the

case was sent back to the District Court, 203 Fed. Rep. 387. After trial a decree was rendered against the defendants, the present appellants. 225 Fed. Rep. 854. This decree was affirmed by the Circuit Court of Appeals, 235 Fed. Rep. 110, and the case comes here.

The District Court found the following facts:

The Exploration Company, defendant herein, is a corporation of Great Britain, authorized to purchase, own, and operate mines, and to purchase and own shares of stock in mines in all parts of the world. It was the owner of mines and mining lands in different parts of the world, and also of shares of stock of corporations engaged in mining in the United States and other countries. In 1901, and for several years thereafter, its representative in this country was Charles A. Molson, to whom it had executed a general power of attorney to represent it in all matters in the United States. The Exploration Company desired to acquire certain coal lands in the State of Colorado, which were a part of the public domain of the United States, but was unable to do so because it was a foreign corporation, and desired more of these coal lands than a domestic corporation could obtain under the laws of the United States. It therefore conceived and carried into effect the following scheme for the purpose of acquiring them: Mr. Molson employed one Henry Burrell to obtain title to the lands. Burrell employed other agents, who were sent to residents of Colorado, legally entitled to acquire public coal lands from the United States, and induced them to make entry of such lands as were pointed out to them by the Exploration Company's agents, and which were supposed to contain valuable veins of coal. A large number of such entries were made on lands situated in the counties of Gunnison and Delta, the parties having filed declaratory statements as required by law. Many of these lands were abandoned and no patents applied for, but the filings on the lands herein involved were paid for and

patents therefor secured. Henry Burrell was a witness in most, if not all, of these entries. The parties who made the entries were promised the sum of twenty-five dollars for their services in so doing. Burrell was to pay all fees, as well as the purchase money, with funds furnished by the Exploration Company. The entrymen and women executed deeds of conveyance for their respective tracts of land and delivered them to Burrell as soon as the final proofs were made and the money paid by the Exploration Company's agent to the respective officers of the land offices within whose jurisdiction the lands were situated. Henry Burrell caused these deeds to be made to Alexander Burrell, his brother, and Alexander Burrell later conveyed the lands to Albert L. Smith, a resident of Montana, the only consideration for the conveyance being that Smith promised to hold them in trust for and to convey them to any person designated by the agent of the Exploration Company. The agent Charles A. Molson having died, the Exploration Company appointed Philip L. Foster to succeed him as its duly authorized general agent in the United States, and Smith conveyed these lands to Foster, without any other consideration, who holds the legal title in secret trust for the Exploration Company. In 1902 patents to these lands were issued by the United States, but the fact that they were secured by false affidavits, and not for the benefit of the entrymen and women, but for the sole benefit of the Exploration Company, who in reality paid the Government the purchase money, was kept secret, and did not become known to any of the officers of the Government, nor did any facts become known to them which could arouse the suspicion of one reasonably diligent that the patents had been obtained by false affidavits for the sole benefit of the Exploration Company until 1909, more than six years after issuance of the patents, and then it only became known to the officers of the Government by reason of the fact that a

Utah corporation had acquired a great many of the public coal lands in the same manner that these lands were obtained, and this being discovered in 1909, the Secretary of the Interior directed in that year an examination of all coal-land entries made in the States of Utah and Colorado. The facts were for the first time discovered in this investigation. There was nothing in the records, or on file in the General Land Office of the United States or the Department of the Interior, which could possibly have aroused a suspicion that these lands had been obtained for the sole benefit of the Exploration Company until the reports of the special agents of the General Land Office were made in the latter part of 1909. As soon as the facts were ascertained, the Secretary of the Interior transmitted them to the Department of Justice, with the request to institute suits to set aside the patents to the lands, and this suit was accordingly instituted on March 3, 1911, several months less than two years after the discovery of the alleged fraudulent acts.

The District Court found that the defendants did not actively conceal the facts which constitute fraud in this case by enjoining silence on the entrymen and patentees, or by directing them or the agents who acted for the Company to refuse to give any information relating to the entries, if asked by the officers of the Government, but were guilty of a passive concealment. When the investigation was made by the agents of the General Land Office, in 1909, in relation to these entries, the patentees, as well as the Company's agents stated the facts truthfully, but until that time the fact that the entries were all made for the benefit of the Exploration Company, and that the legal title held by the defendant Foster was for the benefit of the Company, was concealed. There were no facts or circumstances within the knowledge of any official of the Government prior to the investigation in 1909 which could arouse even a bare suspicion that the entries were made in

the manner hereinbefore described and for the benefit of the Exploration Company.

Mr. Henry McAllister, Jr., with whom *Mr. George E. Tralles* was on the brief, for appellants:[1]

The history of this act (and the associated Act of 1896) indicates that it was intended to include patents secured through fraud, which might be actively concealed and which naturally would be passively concealed; and the failure of Congress to insert any excepting clause covering cases of concealed or unknown fraud indicates that no such exception was intended.

The statute means what it in plain terms says. Construing it this court has held that the lapse of six years from "the date of the issuance" of the patent, without suit, takes away the right as well as the remedy; even void patents are thereby forever validated; *a fortiori*, patents merely voidable because of fraud can never thereafter be challenged. The only open question is whether the land was public land of the United States subject to sale and conveyance through the land department at the time the patent issued. *United States* v. *Winona R. R. Co.*, 165 U. S. 463, 476; *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 477; *Louisiana* v. *Garfield*, 211 U. S. 70; *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 693; *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574, 578; *Hoglund* v. *Lane*, 44 App. D. C. 310, *s. c.*, 244 U. S. 174, 177.

The principle of *Bailey* v. *Glover*, 21 Wall. 342, and kindred cases, to the effect that, where the statute prescribes a limit after "the cause of action accrues" for the institution of the suit, time does not begin to run until the discovery of the fraud, particularly concealed fraud, is based on the theory that until such discovery the cause of action does not accrue. This court and the lower

[1] Counsel, on both sides, referred to the legislative history of the act under construction and that of March 2, 1896, 29 Stat. 42.

federal courts have so held, and it is evidenced by statutory enactments. The principle does not apply to statutes such as the one now in question. The English cases are predicated upon the fact that Statute 21 James I applied solely to actions at law, and therefore the chancery courts might ingraft exceptions in equity cases. *Bond* v. *Hopkins*, 1 Sch. & Lef. 413, 428, 431; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 630; *Ecclesiastical Commissioners* v. *Northeastern Ry. Co.*, L. R., Ch. Div., vol. 4, 845, 859; *Kane* v. *Bloodgood*, 7 John. Ch. 88, 113. Of course, the statute now before us, by its very terms, affects suits in equity, because none other than an equity proceeding could be invoked for the purpose of annulling a patent. Furthermore, it is exclusively confined to "suits by the United States." The "cause of action does not accrue until the discovery of the fraud," is the principle upon which the federal courts predicate their construction of the ordinary statute of limitations. *Bailey* v. *Glover*, *supra*; *Hovenden* v. *Lord Annesley*, *supra*, 634; *Sherwood* v. *Sutton*, 5 Mason, 143; *Carr* v. *Hilton*, 1 Curtis, 230; *Norris* v. *Haggin*, 28 Fed. Rep. 275; *Kirby* v. *Lake Shore R. R. Co.*, 120 U. S. 130, 138; *Goodridge* v. *Union Pacific Ry. Co.*, 35 Fed. Rep. 35, 37; *First Massachusetts Turnpike Corp.* v. *Field*, 3 Massachusetts, 201, 207.

In the light of these decisions, there is no merit in the contention that no distinction can be made between a limitation dating from the accrual of the cause of action and one dating from the issuance of the patent. The view so asserted seems to be that both limitations are identical, as both starting points are the same. This assumption of identity of the initial dates rejects the only ground upon which *Bailey* v. *Glover* and other similar cases can be logically sustained, and indicates that the courts below must have taken those cases as authority for the arbitrary suspension of the operation of an unambiguous statute. While, in technical strictness, both starting

points are probably the same, the fact remains that the courts have not considered them to be the same but have held the "date of the accrual of the cause of action" to be dependent upon when that cause was discovered. This is not illogical and does no violence to the language of the statute involved in *Bailey* v. *Glover*. But it is not logical or fairly possible to say in our case that the date of the discovery of the fraud is the date of the "passage of this act" or the date of the "issuance of such patent."

This same principle is fortified by many statutes, which, adopting it, have provided that in the case of fraud "the cause of action shall not be deemed to have accrued until the discovery thereof."

The preceding discussion demonstrates that the application of the "equitable principle" to statutes such as the one involved in *Bailey* v. *Glover* is not the creation of a judicial exception from the terms of the statute—it is merely by way of judicial interpretation.

The principle does not apply to a statute such as the one in question, where the language is not only explicit but inflexible. *Pickett* v. *McGavick*, Fed. Cas. No. 11126; *In re Brown*, Fed. Cas. No. 1983; *Matter of Herzig*, 15 Abb. New Cases, 179; *Mall & Co.* v. *Ullrich*, 37 Fed. Rep. 653; *Kinder* v. *Scharff*, 231 U. S. 517, 521.

The provision in the statute relative to patents issued before its passage makes it impossible, in such instances, to apply the argument that a statute of limitations may run in certain cases from the discovery of the fraud. The same construction must be given to the entire statute.

Congress was presumptively aware of the rulings that the "cause of action does not accrue until the discovery of the fraud"; and in selecting another and inflexible date from which to measure the period of limitation intended to depart from this principle.

The equitable principles announced in *Bailey* v. *Glover* related solely to statutes affecting private litigants. The

Acts of 1891 and 1896 created self-imposed barriers against suits by the Government only, respecting which the equitable rule now invoked had never been, and cannot be, applied. The statutes neither continued nor repealed any such rule because none had ever existed.

The cause of action was not concealed.

Mr. Assistant Attorney General Kearful for the United States:

When the object of a suit is to obtain relief against a fraud, concealment of the cause of action by the wrongdoer suspends the bar of the statute. This is an old and familiar rule of law and equity, as binding on the courts of the jurisdictions in which it prevails as any statute ever enacted by a legislative body. It is applied in mitigation of the strict letter to the limitation statute as if it were written there in the form of an exception to its general language. The reason of the rule is that statutes of limitation are designed to prevent the wrongful assertion of rights after the evidence to repel them has been impaired by lapse of time, and therefore it could never have been intended by any general words of limitation to provide an instrument for the encouragement and promotion of wrong. Counsel assert that the rule has never been applied in courts of law unless the statute under consideration contained an express exception of concealed fraud, and that it has only been applied in courts of equity in the absence of such exception where the statute related solely to actions at law. Hence, it is argued, where the statute contains no such exception, and expressly bars suits in equity, the rule is inadmissible. The correctness of their premise is the vital point of this case. The exact point was carefully examined and determined by this court in *Bailey* v. *Glover*, 21 Wall. 342, which has been cited often since and never questioned. *Gifford* v. *Helms*, 98 U. S. 248, 252; *Upton* v. *McLaughlin*, 105 U. S. 640, 642; *Rosen-*

thal v. *Walker*, 111 U. S. 185, 190; *Traer* v. *Clews*, 115 U. S. 528, 537; *Kirby* v. *Lake Shore, etc., Railroad*, 120 U. S. 130, 136; *Avery* v. *Cleary*, 132 U. S. 604, 609; *Pearsall* v. *Smith*, 149 U. S. 231, 236; *Kinder* v. *Scharff*, 231 U. S. 517, 521.

The rule of *Bailey* v. *Glover* has been applied to the statute now under consideration, upon facts similar to those of the case at bar, in *Linn & Lane Timber Co.* v. *United States*, 196 Fed. Rep. 593; 203 Fed. Rep. 394, affirmed on another point, 236 U. S. 574; *United States* v. *Puget Sound Co.*, 215 Fed. Rep. 436; *United States* v. *Southern Pacific Co.*, 225 Fed. Rep. 197; *United States* v. *Booth-Kelly Lumber Co.*, 246 Fed. Rep. 970. See also *State* v. *Stone Cattle Co.*, 66 Texas, 363, where the rule of *Bailey* v. *Glover*, was applied to a similar statute upon a state of facts like the present.

The English cases were examined in *Bailey* v. *Glover*. Previously, in 1828 Mr. Justice Story, in the law action of *Sherwood* v. *Sutton*, 5 Mason, 143, had reviewed them exhaustively and demonstrated that in England the exception was allowed in equity both in cases where the limitation act was applicable by analogy merely and in those of concurrent jurisdiction, where the statute bound courts of law and equity alike; and not only in equity but also by the courts of law, without dissent. For a full discussion of the early English and American decisions, leading to the same result, see Angell on Limitations, 6th ed., §§ 183–186, which was written prior to *Bailey* v. *Glover*. See also *Bank* v. *Fairbank*, 49 N. H. 131, 141; *Way* v. *Cutting*, 20 N. H. 187, 190–194; *Bowman* v. *Sanborn*, 18 N. H. 205, 208. The statement of Vice Chancellor Malins in *Ecclesiastical Commissioners* v. *Northeastern Ry. Co.*, L. R., 4 Ch. Div. 845, 859, is true, if at all, only with respect to such equitable claims and titles as were not also cognizable in courts of law. It was not pertinent to the case before him, and was later disapproved by the

Privy Council. *Bulli Coal Mining Co.* v. *Osborne* [1899], A. C. 351, 362.

There is nothing in *Bailey* v. *Glover* to indicate that a period running from the time the cause of action accrued was considered any less definite or more susceptible of interpretation than one running from the date of a designated transaction. On the contrary, the court very plainly regarded the statute as precisely like those dealt with in the cases which it cited. The English statute of 21 James I, c. 16, in the application of which the rule originated, concededly did not employ such language, and "it is to be remembered," as Mr. Justice Story said in *Sherwood* v. *Sutton*, 5 Mason, 143, 153, "that most if not all the statutes of limitations existing [in 1828] in the several States of this Union have borrowed the language of the statute of 21 of James." It was upon the authorities applying the rule to those statutes that the court relied in *Bailey* v. *Glover*. See also *Kirby* v. *Lake Shore Railroad*, 120 U. S. 130; *Greenwald* v. *Appell*, 17 Fed. Rep. 140, 141; *Linn & Lane Timber Co.* v. *United States*, 196 Fed. Rep. 593, 599; *United States* v. *Southern Pacific Co.*, 225 Fed. Rep. 197, 202; *State* v. *Stone Cattle Co.*, 66 Texas, 363; *State* v. *Wichita Land & Cattle Co.*, 73 Texas, 450; *Wichita Land & Cattle Co.* v. *State*, 80 Texas, 684; *Johnston* v. *Roe*, 1 Fed. Rep. 692, 694; *Eddy* v. *Eddy*, 168 Fed. Rep. 590; *Bank* v. *Fairbank*, 49 N. H. 131; *Newberry* v. *Wilkinson*, 199 Fed. Rep. 673, 682–686.

The fact that the rule of *Bailey* v. *Glover* has been very generally adopted by statute in the States, proves only the solid sense and natural justice of the rule. The effect of those statutes is practically to overrule the decisions which were disapproved in *Bailey* v. *Glover* and to make the rule of that case universal in its application. *State* v. *Stone Cattle Co.*, 66 Texas, 363, 367; *Bank* v. *Fairbank*, 49 N. H. 131, 141.

The Act of 1896 concerned only patents "erroneously

issued" under railroad and wagon road grants, and the committee report which accompanied that act shows that the Act of 1891 grew out of the confusion resulting from the administration of railroad grants. But even if it appeared that Congress intended to deal specifically with cases of fraud in the acquisition of coal lands by the use of dummy entrymen, yet, as said in *State* v. *Stone Cattle Co.*, 66 Texas, 363, 367: "It could scarcely have been intended that the fraudulent purchaser should reap a benefit from an aggravation of his offense by the fraudulent concealment."

The greater liability of the Government to fraudulent imposition is all the more reason why it should have the benefit of this "universally implied" qualification of the broad language of the statute.

The Government may receive the notice through its proper officer, like a corporation. See *People* v. *Blankenship*, 52 California, 619; *State* v. *Giles*, 52 Indiana, 356; *State* v. *Furlong*, 60 Mississippi, 839; *State* v. *Warner Valley Stock Co.*, 56 Oregon, 283, 304; *State* v. *Wichita Land & Cattle Co.*, 73 Texas, 450.

There were affirmative acts of concealment; but it is enough that the fraud was such as to conceal itself.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

The Circuit Court of Appeals found that the evidence fully supported the findings of the trial court. We find no occasion to disturb the findings of fact by two courts. The question presented for our consideration is whether the suit was barred by the statute of limitations under the Act of March 3, 1891, 26 Stat. 1093, which provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

As averred in the bill, and found by the courts, the frauds were concealed until after six years had elapsed from the issuance of the patents—"After it was supposed the statute of limitations had barred any action, the participants in the fraud talked very freely, telling the truth when it was thought it would do no harm." It is the contention of the appellants that the statute was intended to bar all actions after six years from the date of the issuance of the patent, that if for six years the Government has failed to discover the fraud, no matter what its diligence in that respect may be, its action against the guilty parties is forever barred and they may hold in security the lands thus obtained by grant from the United States by means of fraud perpetrated in defiance of its laws enacted for the disposition of the public domain. We are unable to agree with this contention. We think the true rule is established in federal jurisprudence by the decision of this court in *Bailey* v. *Glover*, 21 Wall. 342. In that case a question was presented under the Bankruptcy Act of 1867, which provided that no suit at law or in equity should be maintained by or against an assignee in bankruptcy, or by or against any person claiming an adverse interest, touching the property or rights of property of the bankrupt, in any court whatever, unless the same should be brought within two years from the time the cause of action accrued for or against the assignee. The action was brought to set aside a conveyance on the ground of fraud. Among other things it was charged that the bankrupt, his wife, son and father-in-law being defendants in the case, kept secret their fraudulent acts, and endeavored to conceal them from the knowledge both of the assignee and of Winston & Company, a creditor proving a debt, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the previous two years, and that even up to the time suit was instituted they had not been able to obtain

full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property. A general demurrer was filed to the bill on the ground that the suit was not brought within two years as required by the statute. It is thus apparent that no attempt was made to prosecute the action within two years from the time the same accrued. It was contended that the statute was imperative, that it made no exceptions, and that the action was consequently barred by limitation. This court, after a full review of decisions English and American, decided that, notwithstanding the positive terms of the statute, it did not begin to run until after the discovery of the fraud. In the course of the opinion Mr. Justice Miller said: "They [statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

It will be observed in that statute, as in the one now under consideration, there was no provision that the cause of action should not be deemed to have accrued until the discovery of the fraud. But it was held that for the purpose of such statutes the cause of action did not accrue until the discovery of the fraud; that such was the undisputed doctrine of courts of equity, and that the weight of authority, English and American, applied the same rule to actions at law.

Among other cases cited by Mr. Justice Miller, is the decision of Mr. Justice Story at the Circuit in *Sherwood*

v. *Sutton*, 5 Mason, 143, *s. c.*, 21 Fed. Cas. No. 12,782, p. 1303. That case involved a statute of the State of New Hampshire which provided that actions for fraud and deceit should be brought within six years. It contained no exception as to actions founded on fraud where the same had been concealed during the period of limitation, and the question was whether such exception was implied. The cases were very fully reviewed by Mr. Justice Story, and, in holding that the statute did not begin to run until the discovery of the fraud, he said (p. 1307):

"What then, is the reason, upon which this exception has been established? It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason, on which the exception is built, and not merely, that there is an equity binding upon the conscience of the party, which the statute does not reach or control."

Bailey v. *Glover* has never been overruled nor modified in this court and has been approved and followed. *Rosenthal* v. *Walker*, 111 U. S. 185, 190; *Traer* v. *Clews*, 115 U. S. 528, 537, 538; *Kirby* v. *Lake Shore & Michigan Southern Railroad*, 120 U. S. 130, 136; *Avery* v. *Cleary*, 132 U. S. 604, 609. It was also applied in the Court of Appeals for the Ninth Circuit in the case of *Linn & Lane Timber Co.* v. *United States*, 196 Fed. Rep. 593; 203 Fed. Rep. 394.

It is true that Mr. Justice Brewer, in delivering the opinion of the court in *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476, said that no matter what the mistake or error of the Land Department was, or what the frauds of the patentee, the patent would become conclusive as a transfer of title after the lapse of six years. But the learned Justice said in the same opinion that this limitation could not be availed of because the suit was commenced before the expiration of the time prescribed, and that it was referred to as showing the purpose of Congress to uphold titles arising under certification or patent after the lapse of a certain time. It therefore appears that the question was not involved in that case. Nor does it contain any discussion of the doctrine previously laid down in *Bailey* v. *Glover*, *supra*.

In *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, cited by appellants, no question was made as to the effect of concealment of fraud until after the running of the statute. The same is true of *Louisiana* v. *Garfield*, 211 U. S. 70, also relied upon by appellants.

When Congress passed the act in question the rule of *Bailey* v. *Glover* was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind. We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the Government. We are aware of no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the Government as well as a private individual. It is not our belief that Congress intended that the Government should be deprived of title to public lands by those who added to the fraud by which they were obtained, artifices which enabled them to conceal the fraudulent manner